SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 828

L. P. CHISHOLM, WALLER HOLLADAY, W. EARL CRANK, ET AL., PETITIONERS,

vs.

W. B. GILMER, RECEIVER FOR THE FIRST NATIONAL BANK OF LOUISA, LOUISA, VIRGINIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA

At Law. No. 1134

W. B. GILMER, Receiver for the First National Bank of Louisa, Louisa, Virginia, Plaintiff,

vs.

C. L. PERKINS, W. R. DUNKUM, W. WORTH SMITH, JR., P. B. Porter, J. P. Donnally, in Hiw Own Right and as Trustee, Thomas S. Winston, W. Earl Crank, Waller Holladay, J. F. Bickers, Administrator of U. M. Gentry, Hunter Pendleton Porter, Administrator of H. W. Porter, Deceased, and L. P. Chisholm, Defendants

NOTICE OF MOTION FOR JUDGMENT—Filed May 12, 1934.

You are hereby notified that on May 28th, 1934, I shall move the United States District Court for the Eastern District of Virginia, for a judgment against you for the sum of $22,000.00, with interest from January 22, 1934, the same being due to me from you by reason of the following facts:

[fol. 2] The First National Bank of Louisa, Louisa, Virginia, is a banking corporation organized under the banking laws of the United States and the stockholders therein are subject to assessment as provided by the laws of the United States. The First National Bank of Louisa, Louisa, Virginia, has been declared insolvent by the Comptroller of Currency of the United States, and W. B. Gilmer has been appointed Receiver and ordered to file this suit. There has been an assessment of the par value of $100.00 a share duly made by the Comptroller of Currency December 14, 1933. This assessment carries interest from January 22, 1934.

In September, 1930, J. P. Donnally, C. L. Perkins, W. R. Dunkum, W. Worth Smith, Jr., P. B. Porter, Thomas S. Winston, W. Earl Crank, Waller Holladay, U. M. Gentry, L. P. Chisholm and H. W. Porter bought from the First National Bank of Louisa, two hundred and thirty (230) shares of its capital stock of the par value of $100.00 per share after having formed a special combination of them-

selves for the specific purpose of buying said stock for profit, said purchasers were directors in the First National Bank of Louisa, and they had determined that it was for the interest of the Bank, and of course their interest as stockholders and directors, to increase the capital stock by two hundred and fifty (250) shares. They arranged sale of twenty (20) shares of stock and took title to the remaining two hundred and thirty (230) shares in the name of J. P. Donnally, Trustee for L. P. Chisholm and others, so that the stock could be more conveniently handled and shares more conveniently sold. They paid for this stock with the proceeds of a joint and several note discounted in the American Bank and Trust Company of Richmond, Virginia. In August, 1931, ten shares of this stock were sold to R. S. McDonald and the proceeds credited on their joint debt. All dividends from this stock were credited to the account of J. P. Donnally, Trustee for L. P. Chisholm et als. The said owners of the stock were joint adventurers in the purchase and handling of said stock and were joint owners thereof and jointly and severally liable for the assessment made thereon.

W. B. Gilmer, Receiver, is a citizen of the State of Virginia, residing at Louisa, Virginia, in the Eastern District of Virginia. He has been duly appointed Receiver of said [fol. 3] Bank and as such authorized to sue in United States Courts.

W. B. Gilmer, Receiver of the First National Bank of Louisa, Louisa, Virginia, By Counsel. (Sgd.) George Gilmer, p. q.

MARSHAL'S RETURNS.

I hereby certify that on the 7th day of May, 1934, I delivered a true copy of the within Notice of Motion to P. B. Porter, J. P. Donnally in his own right and as trustee, W. Earle Crank and J. F. Bickers, Administrator of U. M. Gentry, all in person, in the town of Louisa, Virginia, a place within my District.

I further certify that on the 7th day of May, 1934, I delivered a true copy of the within Notice of Motion to W. R. Dunkum, in person, at Green Springs, Louisa County, Va., a place within my District.

I further certify that on the 7th day of May, 1934, I delivered a true copy of the within Notice of Motion to C. L. Perkins, in person, at Bell's Cross Roads, Louisa County, Virginia, a place within my District.

Not finding the defendant L. P. Chisholm named within, at his usual place of abode in the County of Louisa, Virginia, or any person upon whom service could be made, I posted a true copy of the within Notice of Motion on the front door of his place of abode in the County of Louisa, Virginia, a place within my District.

I further certify that on the 8th day of May, 1934, I delivered a true copy of the within Notice of Motion to W. Worth Smith, Jr., and Waller Holladay, in person, in the City of Richmond, Virginia, a place within my District.

R. L. Ailworth, United States Marshal, by (sgd.) Thomas N. Saunders, Deputy U. S. Marshal.

I further certify that on the 12th day of May, 1934, I delivered a true copy of the within Notice of Motion to Hunter Pendleton Porter, Administrator of H. W. Porter, [fol. 4] deceased, in person, in the Town of Louisa, Virginia, a place within my District.

R. L. Ailworth, United States Marshal, by (sgd.) Thomas N. Saunders, Deputy Marshal.

I further certify that on the 7th day of May, 1934, I delivered a true copy of the within Notice of Motion to Thomas S. Winston, in person in the County of Louisa, Virginia, a place within my District.

This return is made this 28th day of May, 1934, by order of the District Court of the United States for the Eastern District of Virginia.

R. L. Ailworth, United States Marshal, by (sgd.) Thomas N. Saunders, Deputy U. S. Marshal.

IN UNITED STATES DISTRICT COURT

GROUNDS OF DEFENSE—Filed May 26, 1934

Comes now the defendant, J. F. Bickers, Sheriff, and as such, administrator of the estate of U. M. Gentry, deceased, and for his grounds of defense to the notice of motion exhibited to him, says:

1. That he knows not the circumstances incident to the alleged purchase of 230 shares of the capital stock of the First National Bank of Louisa and calls for strict proof as to the execution of such a contract;

2. That the owners of the stock were not joint adventurers or joint owners to such an extent that they were jointly and severally liable for the assessment made thereon, but that insofar as this defendant's decedent is concerned, the most that can even be claimed is a several liability of $2,000.00;

3. That this defendant's decedent, at the time of the [fol. 5] alleged contract of September, 1930, set out in the plaintiff's notice of motion and upon which this action is based, was mentally incompetent to execute or enter into such an agreement and had been so incompetent a long time prior to said alleged contract and was so incompetent until the time of his death;

4. That no recovery has been had against this defendant on the joint and several note discounted in the American Bank and Trust Company of Richmond, Virginia, the proceeds of which it is claimed were used to purchase the stock in question.

J. F. Bickers, Sheriff, and as such, administrator of the estate of U. M. Gentry, Deceased, by (sgd.) Sinnott & May, Counsel.

IN UNITED STATES DISTRICT COURT

PLEA IN ABATEMENT—Filed May 28, 1934

The said defendant, L. P. Chisholm, in his own proper person, specially appearing for this purpose and none other, comes and says that this Court ought not to have or take any further cognizance of the notice of motion or action aforesaid of the said plaintiff because the said defendant says that no writ has issued from this Court nor has any process requiring him to answer the plaintiff's claim been executed upon him, and the said defendant says that the so-called notice of motion filed in this cause is void and of no effect and no action can be maintained against him in this Court by notice of motion for judgment as the plaintiff has attempted to do in this case.

Wherefore, the said defendant prays that this case be dismissed and that he go hence without day.

(Sgd.) L. P. Chisholm. (Sgd.) M. J. Fulton. (Sgd.) W. W. Walsh.

[fol. 6] *Duly sworn to by L. P. Chisholm. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

PLEA IN ABATEMENT—Filed May 28, 1934

The said defendant, W. Earle Crank, in his own proper person, specially appearing for this purpose and none other, comes and says that this Court ought not to have or take any further cognizance of the notice of motion or action aforesaid of the said plaintiff because the said defendant says that no writ has issued from this Court nor has any process requiring him to answer the plaintiff's claim been executed upon him, and the said defendant says that the so-called notice of motion filed in this cause is void and of no effect, and no action can be maintained against him in this Court by notice of motion for judgment as the plaintiff has attempted to do in this case.

Wherefore, the said defendant prays that this case be dismissed and that he go hence without day.

[fol. 7] *Duly sworn to by W. Earle Crank. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

PLEA IN ABATEMENT—Filed May 28, 1934

The said defendant, W. R. Dunkum, in his own proper person, specially appearing for this purpose and none other, comes and says that this Court ought not to have or take any further cognizance of the notice of motion or action aforesaid of the said plaintiff because the said defendant says that no writ has issued from this Court nor has any process requiring him to answer the plaintiff's claim been executed upon him, and the said defendant says that the so-called notice of motion filed in this cause is void and of

no effect, and no action can be maintained against him in this Court by notice of motion for judgment as the plaintiff has attempted to do in this case.

Wherefore, the said defendant prays that this case be dismissed and that he go hence without day.

Duly sworn to by W. R. Dunkum. Jurat omitted in printing.

[fol. 8] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed May 28, 1934

And the said defendant, Waller Holladay, appearing specially for the purpose of this motion and objecting to the jurisdiction of this Court and for no other purpose, by his attorneys, moves to dismiss the above entitled proceedings because, he says, the notice of motion and return thereon is void and of no effect and that no process requiring him to answer the plaintiff's claim, if any the plaintiff have, has been issued or executed upon him, and because the so-called notice of motion filed in this cause is void and of no effect and no action can be maintained against him in this Court by notice of motion for a judgment as the plaintiff has attempted to do in this case.

(Sgd.) M. J. Fulton, (Sgd.) H. W. Walsh, Attorneys, Who Appear for Purposes of this Motion and None Other.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed May 28, 1934

And the said defendant, W. R. Dunkum, appearing specially for the purpose of this motion and objecting to the jurisdiction of this Court and for no other purpose, by his attorney, moves to dismiss the above entitled proceedings because, he says, the notice of motion and return thereon is void and of no effect and that no process requiring him to answer the plaintiff's claim, if any the plaintiff have, has been issued or executed upon him, and because the so-called notice of motion filed in this cause is void and of no effect and no action can be maintained against him in this

Court by notice of motion for a judgment as the plaintiff [fol. 9] has attempted to do in this case.

(Sgd.) W. Earle Crank, Attorney Who Appears for Purposes of this Motion and None Other.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed May 28, 1934

And the said defendant, L. P. Chisholm, appearing specially for the purpose of this motion and objecting to the jurisdiction of this Court and for no other purpose, by his attorneys moves to dismiss the above entitled proceedings because, he says, the notice of motion and return thereon is void and of no effect and that no process requiring him to answer the plaintiff's claim, if any the plaintiff have, has been issued or executed upon him, and because the so-called notice of motion filed in this cause is void and of no effect and no action can be maintained against him in this Court by notice of motion for a judgment as the plaintiff has attempted to do in this case.

(Sgd.) M. J. Fulton, (Sgd.) H. W. Walsh, Attorneys, Who Appear for Purposes of this Motion and None Other.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS FOR DEFECTIVE SERVICE—Filed May 28, 1934

The defendant, L. P. Chisholm by his attorneys appears herein specially for the sole purpose of making this motion to question the jurisdiction of the Court over his person, and for said purpose only moves the Court to set aside and [fol. 10] quash the alleged service of notice of motion for judgment upon the said defendant.

(Sgd.) H. W. Walsh, 240 Court Square, Charlottesville, Va., and (Sgd.) M. J. Fulton, 1108 Mutual Building, Richmond, Va., Attorneys for Said Defendant Appearing Specially and Solely for the Purpose Aforesaid.

IN UNITED STATES DISTRICT COURT

PLEA IN ABATEMENT—Filed June 1, 1934

The said defendant, Waller Holladay, in his own proper person comes and says that this Court ought not to have or take any further cognizance of the notice of motion or action aforesaid of the said plaintiff because the said defendant says that no writ has issued from this Court nor has any process requiring him to answer the plaintiff's claim been executed upon him and the said defendant says that the so-called notice of motion filed in this cause is void and of no effect, and no action can be maintained against him in this Court by notice of motion for judgment as the plaintiff has attempted to do in this case.

Wherefore the said defendant prays that this case be dismissed and that he go hence without day.

(Sgd.) Waller Holladay.

Duly sworn to. Jurat omitted in printing.

[fol. 11] IN UNITED STATES DISTRICT COURT

ANSWER TO MOTION TO DISMISS—Filed September 25, 1934

The plaintiff answers the motion of the defendants to dismiss this proceeding and says that the notice of motion and return thereon is valid and of full force and effect and that no other process or notice is required and the action can be maintained in this Court by notice of motion for judgment as as the plaintiff has filed.

W. B. Gilmer, Receiver of the First National Bank of Louisa, Louisa, Virginia, by Counsel. (Sgd.) George Gilmer.

IN UNITED STATES DISTRICT COURT

DEMURRER TO PLEAS IN ABATEMENT—Filed September 25, 1934

The plaintiff demurs to the pleas in abatement filed by the defendants in this action and says that the same are not sufficient in law because the only ground alleged in the

plea of abatement for the abatement of the action is that no writ has been issued from this Court, whereas in this proceeding no writ is required to be issued from this Court.

W. B. Gilmer, Receiver of the First National Bank of Louisa, Louisa, Virginia, by Counsel. (Sgd.) George Gilmer.

[fol. 12] IN UNITED STATES DISTRICT COURT

REPLICATION—Filed September 25, 1934

The said plaintiff by his said attorney comes and says that notwithstanding anything by these defendants said in their plea in abatement alleged this Court ought not to be precluded from taking further cognizance of this action because these defendants have been duly summoned as required by law by a notice of motion for judgment and that in such proceeding it is not necessary that a writ issue from this Court and that the defendant is ready to verify wherefore he prays judgment that his claim aforesaid together with interest and costs may be found due him and judgment rendered.

W. B. Gilmer, Receiver of the First National Bank of Louisa, Louisa, Virginia, by Counsel. (Sgd.) George Gilmer.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO DISMISS, ETC.—Entered and Filed October 10, 1934

This day came the plaintiff, by counsel, and L. P. Chisholm, Waller Holladay and W. Earl Crank, by counsel, and after due argument and full consideration, the Court [fol. 13] overrules the motion of the defendants to dismiss this proceeding and sustains the plaintiff's demurrer to these defendants' plea in abatement to which action of the Court these defendants excepted.

And these defendants having stated that they wished to file a demurrer it is ordered that the demurrer be filed with-

in 10 days of this date and a copy given to counsel for plaintiff. It is further ordered that the hearing of this demurrer be set for December 13th, the defendants not waiving their said plea and motion.

(Sgd.) Luther B. Way, United States District Judge.

October 10, 1934.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FILING DEMURRER—Entered and Filed October 25, 1934

This day came the defendants, Waller Halladay, L. P. Chisholm, W. Earl Crank, offered jointly and severally demur in writing and the same is accordingly filed.

(Sgd.) Luther B. Way, United States District Judge.

October 25, 1934.

IN UNITED STATES DISTRICT COURT

DEMURRER TO NOTICE OF MOTION FOR JUDGMENT—Filed October 25, 1934

The defendants, Waller Halladay, L. P. Chisholm, W. E. Crank, jointly and severally demur to the notice of motion [fol. 14] for judgment filed in this case and for grounds of demurrer says:

1. That the same is not sufficient in law;

2. That the notice fails to allege when the alleged assessment was made and that this defendant or any of the other defendants were stockholders at the time of the assessment alleged, or at the time the first note band of Louis was declared insolvent;

3. That the notice fails to allege by what authority the comptroller has undertaken to make the assessment alleged or under what statute of the United States, if any, he was acting in making the alleged assessment;

4. That the notice fails to allege notice to this defendant of said alleged assessment, or demand for payment of the same;

5. That the notice is so vague and uncertain that it does not appear what interest, if any, these several defendants had in said 230 shares or the terms of subscription or contract or ownership upon which liability of these defendants respectively is sought to be based or predicated and held liable for the alleged assessment.

(Sgd.) H. W. Walsh, (Sgd.) M. J. Fulton, Counsel for Demurrants.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING DEMURRER AND SUPPLEMENTAL DEMURRER—Entered and Filed December 13, 1934

This day came the plaintiff and the defendants, L. D. Chisholm, W. E. Crank, and Waller Holladay, and argued the original demurrer filed by these defendants and supplemental demurrer filed this day by leave of Court.

[fol. 15] Upon consideration of which the Court overrules the original demurrer and supplemental demurrer, except the Court sustains the original demurrer for the failure of the plaintiff to allege that the defendants owned the stock sued on at the time of the insolvency or the assessment. Thereupon the plaintiff moved the Court at the bar thereof to be allowed to amend his notice in this case by writing in the margin "said joint adventurers never jointly nor severally disposed of or attempted to dispose of said 220 shares nor any part thereof nor any interest therein, and the same 220 shares were owned by the defendants jointly from the purchase thereof to December 14, 1933". Thereupon the Court granted leave to the plaintiff to amend his notice by writing in the margin thereof said language, which the plaintiff accordingly did at the bar of the Court.

Thereupon said three defendants filed their said original and supplemental demurrer to the notice so amended on the grounds set out in said original demurrer heretofore filed in writing in this case. Thereupon the Court over-

ruled the demurrer to the amended notice and to which action and ruling of the Court the said defendants except.

And on motion of the plaintiff, it is ordered that defendants do file their grounds of defense within thirty days from this date.

And this case is continued and set for trial on April 22, 1935.

(Sgd.) Luther B. Way, United States District Judge.

December 13, 1934.

IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE FROM GROUNDS OF DEFENSE OF J. F. BICKERS, ADMINISTRATOR, ETC.—Filed December 17, 1934

To John G. May, Jr., Attorney for J. E. Bickers, Sheriff and as such Administrator of the Estate of U. M. Gentry:

You are hereby notified that on January 29, 1935, I shall move the United States District Court for the Eastern Dis-[fol. 16] trict of Virginia to strike from your grounds of defense, the third ground because the insanity of U. M. Gentry constitutes no defense to an assessment on the stock, the persons exempt from stock being limited to executors, administrators, guardians, trustees, insane people being not among those exempt from liability and also on the authority of Thomas vs. Continental Trust Company of Pittsburgh, 2 Fed. Supp. 654, and Christopher vs. Norvell, 201 U. S. 216, 26 S. Ct. 502, 50 L. Ed. 732, 5 Ann. cases 740, and other authorities.

At the same time I shall move to strike out the fourth ground on the ground that it is no defense at all, even a release would not constitute a defense. I shall not limit myself to the authorities listed above.

W. B. Gilmer, Receiver for the First National Bank of Louisa, Louisa, Virginia, by Counsel. (Sgd.) George Gilmer, p. q.

Legal and timely service acknowledged.

(Sgd.) John G. May, Jr., Attorney As Set Out Above.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO STRIKE DEFENDANT'S THIRD GROUND OF DEFENSE—Entered and Filed April 1, 1935

[fol. 17] This day came the plaintiff by counsel, and the defendant J. F. Bickers, Administrator of U. M. Gentry, by counsel, and the court having heard the argument of counsel and having maturely considered the matter, overrules the motion of the plaintiff to strike said defendant's third ground of defense, which is as follows:

"That this defendant's decedent, at the time of the alleged contract of September, 1930, set out in the plaintiff's notice of motion and upon which this action is based, was mentally incompetent to execute or enter into such an agreement and had been so incompetent a long time prior to said alleged contract and was so incompetent until the time of his death."

to which action of the court in overruling his motion, the plaintiff by counsel excepted.

(Sgd.) Luther B. Way, United States District Judge.

April 1, 1935.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FILING GROUNDS OF DEFENSE—Entered and filed April 18, 1935

This day came defendants, Waller Holladay, L. P. Chisholm, and W. Earle Crank and moved for leave to file their respective separate grounds of defense, which, being granted the same are accordingly filed, but subject to any proper objections by plaintiff to same being considered at this time.

(Sgd.) Luther B. Way, United States District Judge

April 18, 1935.

[fol. 18] IN UNITED STATES DISTRICT COURT

GROUNDS OF DEFENSE—Filed April 18, 1935.

Defendant, L. P. Chisholm, for grounds of defense says,

1. That he is not liable as alleged in said notice of motion;

2. That he did not with several others named in the notice of motion in this case buy from the First National Bank of Louisa two hundred and thirty shares of the capital stock of said bank of the par value of $100.00 per share, as alleged in said notice of motion;

3. That no contract of subscription or for purchase for two hundred and thirty shares of capital stock of said bank was entered into by him, either individually or jointly with others;

4. That he did not with others named in said notice of motion form a special combination between themselves for the specific purpose of buying said shares of stock for profit as alleged in said notice of motion;

5. That he accepted and paid for one-eleventh part of said two hundred and thirty shares mentioned in said notice of motion, and his interest in stock of said bank in respect to said two hundred and thirty shares was to that extent only.

6. That he was not a joint adventurer with others named in said notice of motion in the purchase or handling of said two hundred and thirty shares, nor was he a joint owner with such others of said shares;

7. That no assessment could be or has been lawfully made in respect to said two hundred and twenty shares as alleged in said notice of motion;

8. That he denies all material allegations of said notice of motion and reserves the right to rely upon the failure [fol. 19] of the plaintiff to prove any material allegation of said notice of motion.

(Sgd.) L. P. Chisholm, by Allen, Walsh and Waddell, Fulton and Hall, His Counsel.

IN UNITED STATES DISTRICT COURT

GROUNDS OF DEFENSE—Filed April 18, 1935

Defendant, W. Earl Crank, for grounds of defense says,

1. That he is not liable as alleged in said notice of motion;

2. That he did not with several others named in the notice of motion in this case buy from the First National Bank of Louisa two hundred and thirty shares of the capital stock of said bank of the par value of $100.00 per share as alleged in said notice of motion;

3. That no contract of subscription or for purchase for two hundred and thirty shares of capital stock of said bank was entered into by him, either individually or jointly with others;

4. That he did not with others named in said notice of motion form a special combination between themselves for the specific purpose of buying said shares of stock for profit as alleged in said notice of motion;

5. That he accepted and paid for one-eleventh part of said two hundred and thirty shares mentioned in said notice of motion and his interest in stock of said bank in respect to said two hundred and thirty shares was to that extent only.

6. That he was not a joint adventurer with others named in said notice of motion in the purchase or handling of said [fol. 20] two hundred and thirty shares, nor was he a joint owner with such others of said shares;

7. That no assessment could be or has has been lawfully made in respect to said two hundred and twenty shares as alleged in said notice of motion;

8. That he denies all material allegations of said notice of motion and reserves the right to rely upon the failure of the plaintiff to prove any material allegation of said notice of motion.

(Sgd.) W. Earl Crank, by Allen, Walsh and Waddell, Fulton and Hall, His Counsel.

IN UNITED STATES DISTRICT COURT

GROUNDS OF DEFENSE—Filed April 18, 1935

Defendant, Waller Holladay, for grounds of defense says,

1. That he is not liable as alleged in said notice of motion;

2. That he did not with several others named in the notice of motion in this case buy from the First National Bank of Louisa two hundred and thirty shares of the capital stock of said bank of the par value of $100.00 per share, as alleged in said notice of motion.

3. That no contract of subscription or for purchase for two hundred and thirty shares of capital stock of said bank was entered into by him, either individually or jointly with others;

4. That he did not with others named in said notice of motion form a special combination between themselves for the specific purpose of buying said shares of stock for profit as alleged in said notice of motion;

[fol. 21] 5. That he accepted and paid for one-eleventh part of said two hundred and thirty shares mentioned in said notice of motion, and his interest in stock of said bank in respect to said two hundred and thirty shares was to that extent only.

6. That he was not a joint adventurer with others named in said notice of motion in the purchase or handling of said two hundred and thirty shares, nor was he a joint owner with such others of said shares;

7. That no assessment could be or has been lawfully made in respect to said two hundred and twenty shares as alleged in said notice of motion;

8. That he denies all material allegations of said notice of motion and reserves the right to rely upon the failure of the plaintiff to prove any material allegation of said notice of motion.

(Sgd.) Waller Holladay, by Allen, Walsh and Waddell, Fulton and Hall, His Counsel.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FILING PLEA OF BANKRUPTCY AND OF THE GENERAL ISSUE—Entered and Filed April 22, 1935

This day came the defendant, C. L. Perkins, and presented his plea of bankruptcy and the general issue and, on motion, the same is hereby Ordered filed.

(Sgd.) Luther B. Way, United States District Judge.

April 22, 1935.

[fol. 22] IN UNITED STATES DISTRICT COURT

PLEA OF BANKRUPTCY AND OF THE GENERAL ISSUE—Filed April 22, 1935

The defendant, C. L. Perkins, by his attorney, comes and says that he does owe Twenty-two Thousand ($22,000.00) Dollars as claimed in the notice of motion, and denies that he with others purchased two hundred thirty (230) shares of stock, as stated in said notice of motion. On the 1st day of May, 1934, that he was adjudicated a bankrupt in the United States District Court for the Eastern District of Virginia and that the said plaintiff's alleged claim was duly scheduled in his petition, that he has applied for, but not yet obtained, his discharge in bankruptcy and that he now pleads said bankruptcy as a bar to the claim made by the plaintiff in plaintiff's notice of motion.

(Sgd.) C. L. Perkins, by Counsel.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO SET ASIDE THE VERDICT, ETC. —Entered and filed April 25, 1935

On the 23rd day of April, 1935, came again the parties by their attorneys and the jury appeared pursuant to ad-

journment. Whereupon the evidence having been fully heard, and each party by counsel having moved the court to direct a verdict in his favor, the court for the reasons stated in its memorandum of opinion from the bench, overruled the motion of defendants to direct a verdict in their favor and directed the jury to return a verdict in favor of the plaintiff. Whereupon the plaintiff by his attorneys moved the Court to omit the name of the defendant, J. F. [fol. 23] Bickers, Administrator of U. M. Gentry, deceased, on the ground that the case has been continued as to him by reason of his having filed a plea of insanity on the part of U. M. Gentry at the time that the transaction involved in this case took place, and to omit the names of W. Worth Smith, Jr., P. B. Porter, J. P. Donnally, and Hunter Pendleton Porter, Administrator of H. W. Porter, deceased, on the ground that each of them has filed a plea of bankruptcy, which motion the court doth sustain. Thereupon, the jury returned the following verdict:

"We, the jury, at the direction of the Court, find in favor of the plaintiff against the defendants W. R. Dunkum, Thomas S. Winston, W. Earl Crank, Waller Holladay, and L. P. Chisholm, in the amount of $22,000.00 (Twenty-two thousand dollars) together with interest from January 22nd, until paid.

(Sgd.) Charles L. Weaver, Foreman."

April 23, 1935.

And it appearing to the court that W. Worth Smith, Jr., has secured a discharge in bankruptcy and that this claim is dischargeable in bankruptcy and that the plaintiff's claim was scheduled in the bankruptcy proceeding, it is ordered that this action be dismissed as to him, and it further appearing that P. B. Porter, J. P. Donnally, C. L. Perkins and Hunter Pendleton Porter, Administrator of H. W. Porter have filed pleas of bankruptcy but that they have not yet been granted their discharge, this action is continued as to them until their discharge is granted or the time for securing it has passed.

Whereupon the defendants by their attorneys moved the court to set aside the verdict of the jury and enter judgment for defendants or grant them a new trial on the ground that the verdict is contrary to the law and the evidence and that the jury should have been instructed to

find for the defendants and because evidence had been improperly admitted and evidence had been improperly excluded which motion the court doth continue for argument until a later day in the term. The defendants duly excepted to the action of the Court in refusing to grant their [fol. 24] motion for a directed verdict and in granting a directed verdict in favor of plaintiff.

(Sgd.) Luther B. Way, United States District Judge.

April 25, 1935.

IN UNITED STATES DISTRICT COURT

MOTION TO SET ASIDE DIRECTED VERDICT—Filed May 31, 1935

Defendants, L. P. Chisholm, Waller Holladay and W. E. Crank move to set aside the directed verdict and award a new trial and for grounds of said motion say:

(1) That no trial should have been had when the case was not set as to U. M. Gentry's administrator and he was not bound by the judgment which might be entered upon the trial;

(2) That the Court improperly admitted evidence as noted in the transcript.

(3) That the Court improperly excluded evidence offered by defendants as noted in the Transcript;

(4) That the Court directed a verdict for the plaintiff when the evidence and the inferences therefrom taken most favorable to the defendants, could have justified the jury in finding a verdict for the defendants;

(5) That the evidence and the inferences to be drawn therefrom were not so clear and direct that the jury might not as reasonable men have found a verdict for the defendants;

(6) That the case, if there was sufficient evidence to sustain a verdict for the plaintiff, should have been submitted to the jury to resolve conflicts and draw inferences from the evidence;

(7) That the Court in directing a verdict for the plaintiff drew inferences, and was obliged to draw inferences,

[fol. 25] directly contrary to the evidence which the jury might properly have accepted and which inferences the jury might properly not have drawn;

(8) That there was no evidence of such circumstances as would involve liability on these defendants for assessment to a greater amount than in respect to one-eleventh part of the 220 shares registered in the name of J. P. Donnally, Trustee; the evidence showed that each of these defendants merely owned one-eleventh, and in no way assumed liability in respect to portions owned by others than themselves respectively;

(9) The Court in directing a verdict for the plaintiff erred for it thereby in effect struck out or disregarded the evidence offered for the defendants as to their contract to purchase of only one-eleventh interest in the 220 mentioned in the notice of motion and disregarded the actual construction placed and acted upon by the defendants on their said contract of purchase; and the Court in effect made a contract of purchase for the defendants in lieu and contrary of that made by them and erroneously substituted the Court's judgment in lieu of the construction placed by the defendants upon their contract of purchase and acted upon by them. This Court may not do so.

(Sgd.) M. J. Fulton, (sgd.) Walsh & Waddell, Attys. for above named defendants.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO SET ASIDE VERDICT—Entered and Filed July 2, 1935

This day came again the parties by their attorneys, and the attorneys for the defendants renewed their motion to set aside the verdict of the jury rendered by direction of the court in favor of the plaintiff on the 23rd day of April, 1935, on the ground that the verdict is contrary to the [fol. 26] law and the evidence, and for reasons stated in a written memorandum presented to court.

And the court, having maturely considered the motion aforesaid and the argument of counsel, doth overrule the same.

Whereupon, it is ordered that the plaintiff do recover judgment against W. R. Dunkum, T. S. Winston, W. Earl Crank, Waller Holladay and L. P. Chisholm and each of them in the sum of $22,000.00, with interest thereon from January 22, 1934, until paid, to which action of the court the defendants, by counsel, except.

(Sgd.) Luther B. Way, United States District Judge.

July 2nd, 1935.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERROR

And the said L. P. Chisholm, Waller Holladay, W. Earl Crank, T. S. Winston and W. R. Dunkum, defendants, assign the following errors in the record and proceedings in said cause,

The District Court of the United States erred in:

(1) Sustaining plaintiff's demurrer to defendant's plea in abatement and in overruling the motion to dismiss for lack of jurisdiction.

(2) Overruling the demurrer to the notice of motion for judgment.

(3) Proceeding to trial without the presence of the administrator of U. M. Gentry, one of the defendants originally named in the notice of motion and when the case was not set for trial as to said administrator; the action was begun by notice of motion against all the defendants jointly, and this procedure was without authority of law so to proceed; and in overruling the objection thereto and [fol. 27] the motion of defendants for a continuance so that all defendants should be bound by any trial and by any judgment as might be entered herein;

(4) Admitting evidence in respect to the execution by the ten personal defendants and U. M. Gentry of a note dated September 8, 1930, signed by these eleven as joint

makers, for $36,450.00, cotemporaneously reduced to $36,000.00, and discount of same at American Bank and Trust Company of Richmond, Virginia, and the pledge of 230 shares of capital stock of First National Bank of Louisa, Louisa, Virginia, as collateral, and the application of the proceeds from said note in payment of the purchase or subscription price for said stock; and in particular the admission of the evidence of L. P. Chisholm.

"that he signed a note"

and the admission in evidence of a copy of the note in question; and the admission of the evidence of C. L. Perkins,

"that in 1930 he, along with Mr. Chisholm and others, signed this big note for $36,450."

(5) Admitting evidence of —. P. Chisholm that he had brought suit against the other ten makers of the note in question in the Circuit Court of Louisa County.

(6) Admitting evidence of J. P. Donnally

"that there were two rival banks in Louisa."

(7) Admitting evidence of J. P. Donnally

"that his bank had been paying 4% on savings; that they had been trying to reduce it to 3%."

(8) Admitting evidence of J. P. Donnally as follows:

"Q. If it (price per share) had gone to $200 and you had sold some of it at $200 a share, how was the profit to be divided?

"A. I assume it would be divided out among the eleven holders of it."

[fol. 28] (9) Admitting evidence of W. B. Gilmer in respect to the amount which each of the ten original defendants and U. M. Gentry appeared from the records of the bank to have on deposit on September 6th, 1930, and the amount of the direct and indirect liability of each to the bank on that date;

(10) Overruling the defendants' motion at the conclusion of the plaintiff's evidence to direct a verdict for the defendants on the claim of joint liability for the entire assessment.

(11) Overruling the defendants' motion at the conclusion of defendants' evidence and after the plaintiff had rested to direct a verdict for defendants in respect to the liability for the entire assessment and as against each for one-eleventh part only.

(12) Sustaining the plaintiff's motion to direct a verdict for the plaintiff and in not submitting the case to the jury under proper instructions in respect to liability, if there was evidence to sustain a liability against each for the entire assessment.

(13) Overruling defendants' motion to set aside the verdict and award a new trial.

For which errors the defendants against whom judgment has been entered as aforesaid pray that the judgment of the United States District Court for the Eastern District of Virginia, entered the — day of June, 1935, in the above entitled cause be reversed, and the cause remanded with directions to award a new trial, and for such other and further relief as may be proper in the premises.

H. W. Walsh and M. J. Fulton, Counsel for Applicants.

IN UNITED STATES DISTRICT COURT

BILL OF EXCEPTIONS No. 1—Filed July 2, 1935

Be it remembered that on the 25th day of May, 1934, the defendants L. P. Chisholm, Waller Holladay and W. [fol. 29] Earl Crank filed a motion to dismiss this proceeding in writing as follows:

And the said defendant (L. P. Chisholm, Waller Holladay, W. Earl Crank) appearing specially for the purpose of this motion and objecting to the jurisdiction of this Court and for no other purpose, by his attorneys, moves to dismiss the above entitled proceedings because, he says, the notice of motion and return thereon is void and of no effect and that no process requiring him to answer the plaintiff's claim, if any the plaintiff have, has been issued or executed upon him, and because the so-called notice of motion filed in this cause is void and of no effect and no action can be maintained against him in this Court by

notice of motion for a judgment as the plaintiff has attempted to do in this case.

And the plaintiff filed an answer thereto in writing which is as follows:

The Plaintiff answers to motion of the defendant to dismiss this proceeding and says that the notice of motion and return is valid and of full force and effect and that no other process or notice is required and the action can be maintained in this Court by notice of motion for judgment as the plaintiff has filed.

And also on the 25th day of May, 1934, the defendant, L. P. Chisholm, Waller Holladay and W. Earl Crank filed a special plea in abatement under oath as follows:

The said defendant (Walker Holladay,, L. P. Chisholm, W. Earl Crank) in his own proper person, specially appearing for this purpose and none other, comes and says that this Court ought not to have or take any further cognizance of the notice of motion or action aforesaid of the said plaintiff because the said defendant says that no writ has issued from this Court nor has any process requiring him to answer the plaintiff's claim been executed upon him, and the said defendant says that the so-called notice of motion filed in this cause is void and of no effect, and no action can be maintained against him in this Court by notice of motion for judgment as the plaintiff has attempted to do in this case.

[fol. 30] Wherefore the said defendant prays that this case be dismissed and that he go hence without day.

And the plaintiff filed a demurrer to said plea in abatement which is as follows:

The plaintiff demurs to the pleas in abatement filed by the defendant in this action and says that the same are not sufficient in law because the only ground alleged in the plea of abatement for the abatement of the action is that no writ has been issued from this Court, whereas in this proceeding no writ is required to be issued from this Court.

And the plaintiff filed his replication to said plea in abatement as follows:

The said plaintiff by his said attorney comes and says notwithstanding anything by these defendants said in their plea in abatement alleged, this Court ought not to be precluded from taking further cognizance of this action because these defendants have been duly summoned as re-

quired by law by a notice of motion for judgment, and that in such proceeding it is not necessary that a writ issue from this court and that the defendant is ready to verify, wherefore he prays judgment that his claim aforesaid, together with interest and costs, may be found due him and judgment rendered.

And thereupon the Court sustained said demurrer to said plea in abat-ment, to which action of the Court the plaintiff excepted.

And upon motion of defendant, L. P. Chisholm, Waller Holladay and W. Earl Crank, this bill of exceptions is signed and sealed this 2nd day of July, 1935.

(Sgd.) Luther B. Way, United States District Judge.

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER REQUIRING PARTIES TO REDUCE EVIDENCE TO NARRATIVE FORM—Entered and filed July 2, 1935

The defendants, C. L. Perkins and others, having through their counsel, presented to the Court their Bill of Exceptions No. 2, approved by counsel for the plaintiff, to be signed and made a part of the record, and the Court being of the opinion that the said Bill of Exceptions, as presented, fails to comply with the rules of the Circuit Court of Appeals for this Circuit, requiring testimony to be reduced to narrative form, declined to sign said Bill of Exceptions as presented, and thereupon, it is

Ordered by the Court that the parties cause the testimony embodied therein to be reduced to narrative form as required by the rules of the Circuit Court of Appeals for the Fourth Circuit, and it is

Further ordered that the time within which defendants may tender said Bill of Exceptions to the Court to be signed and made a part of the record, be and the same is extended to and including August 10th, 1935.

(Sgd.) Luther B. Way, United States District Judge.

July 2nd, 1935.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions No. 2—Filed September 9, 1935

Be it remembered that upon the calling of this case for trial on April 22nd, 1935, it was suggested that the defendant, U. M. Gentry's Administrator, was not present and that the case had been continued as to him. Thereupon counsel for L. P. Chisholm and others insisted that the [fol. 32] action was a joint action and that unless all of the defendants were present and tried together and bound by any judgment, no trial could be had, and accordingly asked that the case be continued. The Court held that the case should proceed as to the ten who were present and otherwise ready for trial without respect to the liability of U. M. Gentry's Estate, who had interposed a special plea of insanity separate and distinct from the pleas interposed by any of the others, to which ruling of the Court the defendants, L. P. Chisholm, W. E. Crank and Waller Holladay, excepted on the ground that this being a joint action the case could not proceed unless all the defendants were present and tried together.

And counsel for plaintiff asked that counsel for U. M. Gentry's Administrator state his position, and the latter stated that he had no definite authority to make any agreement but that whether the liability is $25,000.00 or $2,500.00, so far as advised, that question is not material, as to his client.

Thereupon, to maintain the issue on the part of the plaintiff, he introduced the following testimony:

L. P. CHISHOLM, one of the defendants called as an adverse witness, testified that he has lived in Louisa County, Virginia, some fifty years.

He was asked whether on September 6th, 1930, he signed a note on the American National Bank for $36,450.00, to which question defendant by counsel objected on the ground that it related to borrowing money, not purchase of stock, which was another contract and did not show a joint purchase, and was irrelevant and immaterial. The Court overruled the objection and the defendants excepted on the grounds stated.

Witness stated that he signed such a note in the Fall of 1930.

The same objection was interposed to all evidence with respect to the note in question, and to the admission of the note and of all evidence relating to said note the defendants excepted on the grounds stated.

[fol. 33] The plaintiff then showed the witness a copy of a note, the material parts of which are as follows:

OFFER IN EVIDENCE

"$36,450.00 Richmond, Va., Sept. 8, 1930.

On demand after date we promise to pay to American Bank & Trust Co., Richmond or order, without offset, at American Bank and Trust Company of Richmond, Richmond, Va., thirty six thousand four hundred, fifty and no/100 dollars for value received, having deposited with the holder hereof as collateral security ——.

230 sh. 1st. Nat. Bank Louisa.
10 sh. sold cr. on note.

220 balance held.

Here follow the provisions as to sale, etc.

		Makers
9-9-30 By cash	$450.00	Waller Holladay, J. P. Donnally
8-13-31 By cash (stock sold)	1,500.00	P. B. Porter, T. S. Winston,
Int. pd. to 3-1-33.		U. M. Gentry, L. P. Chisholm,
		W. Earle Crank, C. L. Perkins
		W. R. Dunkum, W. Worth Smith Jr.
		H. W. Porter."

(Omitted provisions are those usual to collateral notes.)

Witness stated that it was a copy of the note he had signed, he could not recall who had signed the note when he did, but several had.

To the question whether witness had brought suit in the Circuit Court of Louisa County against the other ten makers, the defendants objected on the ground that such had to

do with liability on the note and was irrelevant to the purchase of the stock. The Court overruled the objection and [fol. 34] defendants excepted on the grounds stated. And the same objection was made to all evidence relating to a suit brought by this witness in connection with the liability on the note in question, pleadings and judgment.

"The Court: The stock was subscribed for. That is one agreement between the people. They went down and made a joint promissory note for a certain amount. That is another agreement. A joint judgment was rendered against them."

The witness stated that he had filed a supplementary pleading against C. L. Perkins and that it had alleged that Perkins' share will exceed $15,000, as not over $8,000 could be recovered from the other co-makers.

Q. Then there was an agreement between you that your share of the loss should be limited to one-eleventh?

A. We agreed to take one-eleventh of that stock.

Q. But where any man didn't pay his part you alleged the others had to make up for his share, don't you?

A. We didn't have any agreement to that effect.

Q. Isn't that what you have charged against Mr. Perkins in Louisa, that those who can pay have to pay for all the ones that can't?

A. I don't know that I charged that to Mr. Perkins.

Q. You don't claim that the $15,000 that you asked Mr. Perkins to pay is one-eleventh of the note, do you?

A. It seems to me Mr. Perkins has got two cases mixed up together but I am no lawyer.

Q. The whole liability, including the attorney's fee and costs, was about $37,000, wasn't it?

A. Yes, sir.

Q. And you are asking one of the co-makers to pay $15,000, aren't you, out of $37,000?

A. (No response.)

Q. Isn't that what you are doing?

A. I thought he was suing on the eleventh part."

He was suing Perkins for $15,000 contribution as one of the signers of the note for $36,450 in the American Bank, as he would not be able to collect more than $8,000 from the other signers; there was no other judgment against him

and no suit against him except the present one for $22,000 stock assessment.

The note for $36,450 was put in American Bank to pay [fol. 35] for all the stock; neither he nor any of the others put in any cash when the stock was bought, but they offered to do so; all who signed the note were directors, named as follows: Walter Holladay, P. B. Porter, J. P. Donnally, T. S. Winston, U. M. Gentry, L. P. Chisholm, W. Earle Crank, C. L. Perkins, W. R. Dunkum, W. Worth Smith, Jr., and H. W. Porter, and no others; the collateral for the note was the stock and each one said his eleventh part would stand for it and each one agreed to have one-eleventh part and put it up as collateral; he signed no certificate and never saw it or asked to see it.

Q. The agreement was that the stock you bought was to go up for the note?

A. Each one said his eleventh part would stand for it.

Q. All the stock bought by the directors was put up for that note except Jesse Donnally's ten shares?

A. And each one agreed to have one-eleventh part and put it up as collateral.

Q. Did you sign any certificate for one-eleventh, to endorse only one-eleventh?

A. I didn't sign any certificate but I got a receipt to show I paid for one-eleventh.

Q. Where is your receipt?

A. Mr. Walsh has them.

Q. Let me see it. You directors agreed to take all of that stock that wasn't taken by the stockholders?

A. We agreed to take our eleventh part.

Q. You all agreed as a Board that there would be none of that stock unsold?

A. We agreed that that stock should be sold to people in Louisa County and each one of us subscribed to one-eleventh part.

Q. And whatever was not sold the Board was going to take?

A. I didn't know anything about that.

Q. All that wasn't sold to others the Board took, didn't it?

A. I suppose it did but I didn't agree to any of that."

American Bank agreed to carry the note until the stock was sold no matter how long that was; he signed no renewal note; Mr. McDonald bought ten shares of the stock; the proceeds of the big note went to the credit of First National Bank of Louisa, but he had nothing to do with the bank; he resigned as director in 1931 because he was in business in West Virginia and was not able to come home.

[fol. 36] Q. Wasn't the $37,500 item big enough for you, as a director, to pay some attention to?

A. I suppose so. I agreed to take an eleventh part of it, which I did do.

Q. You agreed to take an eleventh part of the note?
A. Yes.

Q. And you are paying more than one-eleventh?
A. Yes, sir.

Q. You are actually paying more?
A. Yes, sir.

One certificate of stock was issued to J. P. Donnally, Trustee, and the reason the stock was put in the name of J. P. Donnally, Trustee, was so he, Donnally, could sell it to people in Louisa County; that they agreed to sell it to whom they agreed to sell it without having so much red tape, or anybody he wanted to, without talking to witness or anybody about it, and fixed it in Mr. Donnally's name as more convenient; witness understood 10 shares sold McDonald were cut off the joint block and that note will show whether $1,500 was credited on the joint note; Donnally had authority to sell any of the stock at $150 per share; witness figured he was liable for one-eleventh, the part he took and paid for and no more and never expected to have to pay more than one-eleventh and never expected any one else to pay more than one-eleventh; but all of them agreed it was one-eleventh part and pay one-eleventh of the loss, that is pay accordingly, and nobody would have to pay more; the original block was for 250 shares and he had a fractional interest in it and when ten shares were sold to the people he had the same interest in the remaining 240 shares and when ten more shares were cut off to Donnally he had a one-eleventh interest in the remainder and when ten more were cut off to McDonald he still had one-eleventh, each time there was any stock cut off it was cut off the joint block and he owned one eleventh of each share that was sold and retained one-

eleventh in what was left; and that ten shares were not taken out of his or anybody else's; if the stock had gone up and been sold for $160 or $175 the President and Cashier would have had to explain what to do with the profits and he supposed they would have had a meeting to devise what was to be done and that possibly he would and possibly he would not claim his share, but he did not go into it for profit; it would be human nature to claim part if any was handed to him; the capital stock was increased because [fol. 37] "they had more money than they really ought to have in cash", somewhere about $700,000 deposits and the capital of the bank was $50,000 and the Board decided to increase the stock; his family has lived in Louisa County, he has been working on work for C. & O. or B. & O., any job he could get; he couldn't tell whether State Bank at Louisa had increased its capital shortly before, doesn't know what its capital is; State Bank not a rival bank to his knowledge; there were just two banks in Louisa County, he did business with both, one was located on one side of street and the other on the other side, not 100 yards apart.

Q. How much of that 250 shares increase did you want to buy personally for yourself—any of it?

A. I would have taken one-eleventh or I took one-eleventh. That is what I agreed to take.

Q. How much did you want transferred to your name and pay for personally?

A. One-eleventh.

Q. Why didn't you take it out and pay for it?

A. Because we agreed, as I explained, to leave that for the benefit of the public in Louisa so the public would get it and we didn't go in for any profit.

Q. If you were going to leave it for the benefit of Louisa County, you didn't want to buy any particular share and get it in your name?

A. We agreed to take one-eleventh part which we did do.

Q. I understand that, about the one-eleventh; I have heard that in every answer but what I am asking you now is how many shares did you want to have registered in the name of L. P. Chisholm personally?

A. I offered to take one-eleventh but they said, "we will go along and sell them to the County". That is all I agreed to do.

Q. And how many shares did you offer to take?

A. One-eleventh part.

Q. And how many shares would one-eleventh be?

A. I don't know exactly how many shares it would be. It would be twenty-two shares, I think. I can't figure in my head.

Q. You wanted to take twenty-two shares?

A. I wanted to take one-eleventh part of that block. He never got a certificate for one-eleventh share, never collected a dollar dividend; that he paid one-eleventh and got a receipt to show, referring to interest on the big note; supposed dividends were credited to joint account in name of Don-
[fol. 38] nally, Trustee; bank paid dividends quarterly; stock was increased in September, 1930; Bank paid 6% at first and after some discussion they cut it to 4%; when interest was paid American Bank Donnally sent a statement; supposes Donnally's purchase was credited on the big note at the time he bought, but couldn't swear to it as he doesn't know, and thought Donnally owned one-eleventh of the remainder; and each of the others owned one-eleventh; when he gave that note he had a pretty good account, perhaps $15,000.00 and could have written a check for two or three times his one-eleventh, but did not do it because he agreed to take one-eleventh, some of them were not able to pay cash and all agreed to sign the note in order to go along so Mr. Donnally would have authority to sell it any time he got ready; they weren't able and we all agreed we would carry it along; Mr. Perkins said he was able, he offered to pay it same as witness and get his stock, and he agreed like witness to go along with the others on that note; some said they were not able to pay their part and decided it was best for the bank for all to carry it on together; he had fairly good contracting business; he went to Washington with his attorneys, Fulton and Walsh, in connection with the $22,000 stock assessment; American Bank sued all on note for $36,450; never voted one-eleventh of stock and never sent proxy; Donnally wanted ten shares so he could qualify as director.

Q. Wasn't that the reason you agreed to let him have ten shares?

A. No, sir, so he could sell that other and he wanted to agree to sell his eleventh part.

Q. You agreed to let him have ten shares so he could sell the other?

A. No, we agreed for him to sell the eleventh part. Witness never signed any subscription agreement, there was a verbal agreement they would take one-eleventh part.

On Cross-examination:

It was his understanding each one of the eleven would take one-eleventh part which they did and agreed to it and did it; the stock was not issued to each separately, one-eleventh part, but to Donnally, Trustee, because the Board of Directors so decided as some of them could not pay for [fol. 39] it and they signed a joint note for it, "and it would be one-eleventh part, each one of the eleven".

In respect to selling, there wasn't any profit contemplated, the stock was purchased at $150.00 per share and was to be sold at $150; during the time the stock was held pending sale each paid his one-eleventh part of the interest on the big note; when the note for $36,450, later reduced to $34,500, was executed the understanding in respect to liability of each was that each man was expected to pay his one-eleventh part of that note; in the purchase of the stock he was purchasing one-eleventh part and was raising that one-eleventh by this joint note; his understanding with respect to his rights with the American Bank to pay one-eleventh of the note and take down one-eleventh of the stock was that he could have paid the one-eleventh if he wanted to and take one-eleventh of the stock.

On redirect examination:

Witness testified with respect to this agreement with American Bank that Mr. Holladay offered to do it, but the agreement was not put in the note nor in writing and when asked if the bank let him off on one-eleventh, witness replied that he never asked to be one-eleventh.

C. L. Perkins, one of the defendants called by the plaintiff as an adverse witness, testified as follows:

He had been a director in First National Bank of Louisa mighty near since it was organized; in 1930 he, along with Mr. Chisholm and others, signed this big note for $36,450.

To this evidence relating to the execution of a note discounted at American National Bank and Trust Company, defendants objected, which objection was overruled, and defendants excepted on the ground that such evidence was irrelevant and immaterial to any issue here. Which objection and exception were interposed to all evidence relating to the execution and discounting of the note by which the purchase money was raised.

He agreed to try to pay one-eleventh instead of going on the big note, didn't want to go on any of it; was ready, willing and able to pay his one-eleventh; didn't mind own- [fol. 40] ing one-eleventh at that time, but they said that they wanted the stock in order to distribute it around among the people and he already owned twenty shares of it then, and "they didn't want us to own any more", they wanted to distribute it around amongst the others.

Q. And they wouldn't agree for you to pay your one-eleventh and stay off the note, would they?

A. No, sir. I asked about the note and, as I thought, the understanding was when they got this stock and got straightened out some of them said they didn't have the money and I don't know that anybody else really said they wanted to pay or anything of the sort, but I never had signed a note for other people and I didn't want to go on that one but I did go on it after they told me that the capital in the bank was more than the capital stock of the bank and that was the way they claimed to be taking it out, was to take care of that.

Q. And the rest of them on the Board persuaded you to sign that note?

A. Yes, sir, I got after them several times after that about it because I didn't want to pay interest on it and things of that sort and I asked Mr. Donnally about it several times and he stated that everything was going to the bad, I reckon was the cause of it, that he couldn't sell the stock for $150 and they weren't going to sell it and they were holding it but if he had told me the circumstances I would have said sell it if they haven't got but one hundred dollars or seventy-five—better have something than nothing, but they didn't consult me about that part of it.

J. P. DONNALLY, a defendant called as an adverse witness, testified as follows:

He was cashier of the First National Bank of Louisa when it failed and had been since April, 1917; he continued to work for it until June, 1933; at present time was manager of University Branch of Peoples National Bank of Charlottesville; capital of First National Bank of Louisa was increased in September 1930 for the reason that the deposits in relation to the capital had become top-heavy; there were two rival banks then in Louisa, the other the Bank of Louisa; he thought the Bank of Louisa in the latter part of 1929 increased its stock from fifty to one hundred thousand, and the two banks were just about the same size.

[fol. 41] To all the evidence about the other bank defendants objected, whereupon ruled

The Court: I don't think it is material, but go ahead.

His bank had been paying 4% on savings, they had been trying to reduce it to 3%; the prospects of reducing the rate on savings were brighter about the time they increased the capital than they had been; the effect on earnings would have been that they had about $600,000 on deposit and were paying $24,000 interest and the saving would be about one-fourth or $6,000; the Board of Directors had no plan of increasing dividends out of that saving, had never discussed the increase of dividends, but recognized there would be a difference in earnings; it is possible some had discussed making the stock 8% stock if they could reduce the interest; such was his idea; it would increase the value of the stock considerably, and 8% dividend would have paid the same net return on a stock of $200 that 6% would on $150; the witness was asked if he had been able to sell that stock at $200 a share, what would become of the profits, how they were to be divided.

To this evidence the defendants objected on the ground that the evidence shows that the stock was to be sold at the same price at which it was purchased and that there was no profit contemplated. But the Court overruled the objection and admitted the evidence, to which ruling the defendants excepted on the grounds stated.

A. It would be divided out among the eleven holders of it, each getting one-eleventh.

When the dividends didn't meet the interest, he assessed each one of them one-eleventh of the difference; the directors underwrote the whole 250 shares and agreed to take it all if outsiders didn't take it and when the day arrived that the note was to be signed he had sold outside only ten shares; when the note was signed three shares hadn't been collected for and he made a credit on it afterwards; it was originally written to pay for 243 shares, $36,450; the American Bank was going to carry the note whether it was 240 or 250; signed by all the eleven directors and nobody [fol. 42] else; it was never curtailed but there was a credit put on from the sale of ten shares to an additional director when he was elected to the Board after the note was given, $1,500 credit; he kept a bank account in the First National as J. P. Donnally, Trustee, to place dividends in and pay the interest; all dividends except the last cleared through that account; several dividends they didn't accept, two or three; as far as cashed they were put in his Trustee's account; in answer to the question "Then you made assessments on the different members, didn't you, as Manager?" he answered, "Yes". That he wrote a single check against the Trustee's account to pay interest on the whole note up to the last payment which was, he thinks, collected by him from the individuals in cash and notes and sent to Mr. Sands, President of the American Bank; he voted the stock at all meetings without asking authority; none of the directors appeared and asked to vote their one-eleventh or asked for one-eleventh of dividends, which came to him (Donnally) as a unit; he sold to McDonald without getting authority from any of the Directors, feeling that he had authority as they gave him that authority when the stock was placed in his hands as Trustee; had oral authority to sell at $150, but he couldn't say that he had authority to sell in big blocks, but they had agreed that five shares would be enought for any man in the County unless there was some exception like the McDonald case; he endorsed the old certificates and issued a new one in his name as Trustee when he sold to McDonald; he got ten shares in order to qualify as director; he owned one-eleventh of 230 shares, or around twenty-some shares, and asked and received permission of the other eleven to withdraw ten shares

and accept his name on the note as payment in full for the 22 shares, and hold the ten shares free of encumbrance; he then owned 12 shares in the block and not one-eleventh, his percentage being smaller after he did that.

On cross examination, the witness was asked concerning an inquiry from an examiner as to the ownership of the stock and how it was held, the purpose of the question being to show that the thought that one-eleventh interest in the stock was held by each director was not a new idea. He said he made an oral report, in answer to the examiner's inquiry, which was made in the course of the examination of the bank by the official bank examiner.

[fol. 43] Upon objection by the plaintiff, the Court asked:

Q. Was it incorporated in any written report to the Comptroller?

A. Judge, I couldn't tell that. I gave it to him. I suppose he put it in there. I don't know.

Thereupon the Court sustained the objection, saying:

Any formal reports or anything issued in the regular course of business to the Comptroller would be admissible. Some casual inquiry made by a bank examiner would not be.

Witness further testified that in July of the years 1931 and 1932, he filed in the Comptroller's office, as required by statute, a report of the stockholders of the Bank, which showed the 220 shares in his name as Trustee and no more; an appraisal of the assets of the Bank was made by the Comptroller's office in April 1933; interest on the large note was paid by his check as Trustee; he sent notices to each of the makers and asked for a check for one-eleventh of the interest and each paid one-eleventh; there was no possibility of profit, as he had orders to sell at $150, the price at which it was bought; the dividends did not quite equal the interest on the note; each of the gentlemen paid one-eleventh of the difference; there was no agreement as to how the stock should be voted, but if any one had declined to have him vote it, he wouldn't have done so; there was no agreement as to who should vote the stock.

The plaintiff, W. B. Gilmer, testified that he was appointed Receiver of the First National Bank of Louisa on October 10, 1933, and produced the certificate of his ap-

pointment; the Bank, which is a national bank, was closed at the end of business on March 4th, 1933 (a copy of the charter of the bank was introduced showing it was a national bank); a fifty per cent dividend had been paid under a Spokane Plan Contract by means of which a purchasing bank took over one-half the assets and the remaining half are held fully responsible for repayment of what they put out; the prospect for further dividends is reasonably slim, but he hopes to pay ten or twelve cents if he can collect on stock liabilities; the Comptroller made a 100% assessment [fol. 44] of stock on December 14th, 1933, payable January 22nd, 1934, and notices were sent to all stockholders, including notice to the manager of the block of 220 shares and an individual notice to each of the directors demanding full payment of $22,000 jointly and severally; the assessment authorized suit; the increase in stock of 250 shares was authorized September 11, 1930.

The proceeds of $36,450 note were placed to credit of First National Bank of Louisa on September 9, 1930; a block of 230 of the new shares were originally issued in September, 1930, to J. P. Donnally, Trustee, 2 shares to B. E. Martin, 5 shares to Stella G. Moss, 1 share to R. N. Harris Jr., 2 shares to A. C. Goodwin, 10 shares to J. P. Donnally; only B. E. Martin and Stella G. Moss were already stockholders; the stub of the 230 share certificate reads "J. P. Donnally, Tr. L. P. Chisholm" and the certificate reads "J. P. Donnally, Tr. L. P. Chisholm" and with later writing "et als."; the endorsement for transfer shows "J. P. Donnally, Tr. L. P. Chisholm, et al." and the certificate was turned in for cancellation August 1st, 1931, there being issued in its place a certificate for ten shares to R. S. McDonald, one for 20 shares to J. P. Donnally, Trustee L. P. Chisholm et als., and 200 shares to J. P. Donnally, Trustee L. P. Chisholm. (The certificates were exhibited to the jury.)

The American Bank originally held as collateral 230 shares and finally one certificate for 200 shares and one for 20; the dividends on this stock and J. P. Donnally's stock were paid to J. P. Donnally, Trustee, and J. P. Donnally credited them to the J. P. Donnally Trustee account, and in latter days when things were not so strong the Directors instead of taking out their dividends actually returned them

to undivided profits account. (Dividend checks were exhibited to the jury and the ledger sheet of the J. P. Donnally Trustee account.) The five charges to the account are the same as the interest payments on the note at the American Bank.

Witness further testified, after objections to the testimony had been made by defendants, which were overruled, and exception noted on the ground of immateriality, that on September 6, 1930, the following named gentlemen had on deposit and were liable to the bank as follows:

[fol. 45]

	Deposit	Direct Liability	Indirect Liability	Total
T. S. Winston	0.00	$6,900.00	$7,280.63	$14,180.63
W. Worth Smith	53.71	6,916.00	11,585.05	18,501.05
Waller Holladay	00.00	6,000.00	7,837.20	13,837.20
P. B. Porter	570.61 (overdrawn)	6,982.29	2,605.00	9,587.29
H. W. Porter	515.22	4,497.80	100.00	4,597.80
J. P. Donnally	120.09	4,875.00	2,817.89	7,692.89
W. Earl Crank	1,148.68	6,800.00	12,025.89	18,825.89
L. P. Chisholm	16,717.81	.....	.....	.....
U. M. Gentry	9,824.58	.....	2,200.00	2,200.00
C. L. Perkins	117.34	500.00	.....	500.00
W. R. Dunkum	0.00	3,900.00	2,500.00	6,400.00

[fol. 46] Prior to the new issue of stock the directors who purchased this stock owned about 75% of the stock of the bank and after the new issue about 90%; he had examined carefully the records in the bank and at Washington and found nothing to show who were the owners of the stock other than J. P. Donnally, Trustee; he received a reply from Mr. Chisholm, or his counsel, dated January 17, 1934, to the notice of assessment and demand for payment sent him, denying liability.

Motion for Directed Verdict

At this point in the testimony the plaintiff rested and the defendants moved for a directed verdict, on the grounds that the evidence showed the defendants were owners of one-eleventh interest as mere tenants in common and nothing is shown to create a liability for a greater amount than the amount of their respective interests in the stock in question, and that there was no special combination, nothing in the nature of a joint adventure or limited partnership for profit, as alleged. The motion was overruled and the defendants excepted.

Evidence for Defendant

P. B. PORTER, one of the defendants, a witness for the defendants, testified: he had been Clerk of the Court in Louisa County since 1913, had lived in Louisa all his life and had been president of the bank from its organization until it closed; in 1930 it was suggested that deposits in the bank greatly exceeded the capital, and an increase in capital would be along good banking lines; the increase was taken up with the Directors in midsummer, June 21, 1930, and at that time it was said that such of the new stock as was not taken up under preemption rights should be placed in the hands of a Trustee, Mr. Donnally, and that the stock should be distributed and sold over the county as widely as possible; the Directors had the privilege of taking the stock; each was to take one-eleventh part, each to pay one-eleventh at the rate of $150 for each share of stock they took; each was to get 21 or 22 shares or something like that; that was the understanding he had with each of the others. Asked what was said about how they were to pay for it, witness answered that the whole issue was already paid for and held by Donnally, Trustee, and he presumed it was to be divided up and paid for as best they could.

The witness stated that the ownership of each in the stock [fol. 47] to be issued to Donnally, Trustee, was one-eleventh; it was put in Donnally's name more for convenience than anything else so that in issuing stock sold everybody wouldn't have to come and change their certificates, he was purchasing at $150 a share and Mr. Donnally was to sell at $150, profit was not considered at all; Mr. Donnally didn't own any stock and wanted to be a director and by arrangement with American Bank and Trust Co. they permitted him to have issued to him ten shares of stock; he didn't know that there was any agreement as to the right of any one to have his one-eleventh set off to him, or that it was discussed, but he always felt he owned one-eleventh of the stock.

By the Court:

Q. What interest did you have in the 220 shares?

A. As I said formerly, sir, my interest was one-eleventh. That is what I considered.

He paid one-eleventh part of the interest to Mr. Donnally and presumes that Donnally sent it to the American Bank & Trust Company.

Cross examined, he stated that in 1930 he bought stock along with the other directors and borrowed money on a joint note to pay for it; he didn't write any check, but just put a note in the bank along with all the other joint purchasers; no length of time that the note was to be handled by American Bank was specified, he understood it was to stay there until they could dispose of the stock; he might have been one of those that persuaded Mr. Perkins to come in and had some trouble persuading his brother, Dr. Porter, to sign the note but that others also talked to him; there were a good many interested in getting the whole board on the note and having them all buy the stock together; Mr. Donnally had no right, when he sold, to take it except equally off the directors, or rather the whole 240 shares, and couldn't sell off the 20 shares or whatever he (Porter) was claiming; whenever Donnally sold one share he was selling one-eleventh of his (Porter's) shares and one-eleventh of Chisholm's and one-eleventh of each of the others; Donnally was his nephew, and he was one of the ones that hoped to get the savings interest cut from 4% to 3%.

[fol. 48] Defendants objected to this evidence as being too remote. The objection was overruled and defendants excepted.

This would make a saving of about $6,000 a year; he did not plan to increase the dividends but to increase the surplus; the stock was selling at $150 then and he did not think it would go up in the near future, but thought that it would in the next three or four years go to $175 or $200; there was no expectation of profit; three-fourths of the deposits were savings upon which 4% was paid amounting to about $24,000 or $25,000 a year and it was hard to pay the dividend and create a proper surplus and undivided profit; it would have been bad policy to increase the dividend; if the stock had gone up the profit would naturally have inured to the eleven men who owned the stock and would unquestionably have been divided equally; the loss on interest was shared equally; each paid his one-eleventh of the interest to Donnally who put it in one trust account and sent one check to Richmond, and all dividends were put into that account; Mr. Donnally always voted that stock

at meetings, as he had the privilege of doing; he presumes as a unit; he never endorsed any certificate when the stock was put up as collateral or signed as owner the new certificate issued to McDonald; if the stock hadn't been sold to the people of the county or contiguous counties, he presumed it was to be divided among the directors but he had no idea when; each director would then have to pay his one-eleventh of the note; the stock was taken in Donnally's name for convenience and put up as collateral; it was to be disposed of over the county generally; he doesn't think the question of whether one of the directors might sell his stock in advance and cut the price ever arose; if Mr. Donnally sold ten shares each would own the same interest in the 210 shares that he had in the 220.

WALLER HOLLADAY, one of the defendants, a witness for defendants, testified that he was a director in 1930 and also a director in the American National Bank of Richmond. In September the stock of the First National Bank of Louisa was issued; it was agreed that each member of the Board would subscribe to one-eleventh of the stock; he bought one-eleventh and that was the agreement of all the [fol. 49] directors; it was arranged that the stock was to be paid for by execution of a demand note signed by the directors, or the men constituting the Board; it was signed by the individuals who were the directors; the note was negotiated with the American Bank and Trust Company with 230 shares as collateral, it was dated September 8, 1930, for $36,450, with some credits leaving $34,500; the stock was deposited by Donnally as Trustee with the American Bank and Trust Company as collateral for the note; at the time the stock was issued it was thought advisable to broaden the influence of the bank through the county, and distributing the stock in small quantities would be a good way to do it; to avoid the necessity of writing eleven certificates every time a share was sold it was thought advisable to put the stock in one certificate to avoid confusion and unnecessary labor; the stock paid for some time 6% on par and the difference between that and the price at which the stock was purchased was paid proportionally one-eleventh by each signer of the note; dividends were paid on the stock to Mr. Donnally as Trustee and placed to his

credit as Trustee, he would then ask each director to pay his proportionate amount in order that the aggregate might pay the interest due the American Bank and Trust Company; each director bought one-eleventh interest; Donnally was not a director at the time the stock was bought, but he bought one-eleventh and immediately qualified as a director by withdrawing ten shares with the consent of the others; it was agreed that Mr. Donnally should sell that stock to such persons as he thought advisable for the best interests of the institution, the idea being that the stock would be distributed in small lots, at $150 per share; that it was bought at $150 and not bought for profit.

On cross examination, witness testified that he signed the note for no reason whatever except his interest in the little bank in which he was very much interested; and thought it advisable to increase the stock to widen the influence of the bank in the county, to distribute the stock; he owned 20 shares in addition to the 220 share block; he has paid nothing on account of the assessment on the 20 shares, and has paid nothing for the 220 shares except the proceeds of the joint note; the 220 shares were represented by one or two certificates in the name of J. P. Donnally, always voted [fol. 50] by Donnally; he had a one-eleventh interest, but if somebody had gone to Mr. Donnally and wanted to buy five shares off his (Holladay's) stock, Donnally couldn't have sold that stock off from any part without consulting the other directors and without getting the consent of all of them he couldn't sell any and charge it up to an individual interest.

Q. It had to be off the common interest?

A. I should like to say, in way of explanation, that had I gone to Mr. Donnally and asked that my stock be delivered to me upon payment of $150 per share I would have had every right to have withdrawn my stock.

Q. But if John Smith came to him and wanted to buy ten shares at $150 a share he couldn't sell it from any one of the directors' interests; it had to come off the common interest?

A. He would have sold it from the entire lot.

Q. And he had no right to sell it from any one share in the common lot, did he?

A. No.

At the time the note was signed Mr. Perkins made no formal protest to the board, but he heard Mr. Perkins remark that he could pay for his part, but at the suggestion of Mr. Gentry Perkins went along with the other directors; he doesn't recall any protest or any coercion in signing this note, in paying for the stock, either by note or cash; he cannot say that the majority protested against any one taking their stock and paying for it; when the stock was reduced to 220 shares, 20 shares could have been issued to each one of the owners; that if eleven certificates for 20 shares each had been issued and "John Smith wanted 10 shares and they wanted to cancel one 20 share certificate, taking ten of that and giving it to John Smith and leaving ten in the name of the seller, the only question involved would have been with the American Bank & Trust Company as to leaving one off the note, for if any one had sold his proportionate part he would naturally have asked to be left off the note; the question never arose; he doesn't say that there would have been any objection but there would have to be negotiation with the American Bank & Trust Company; each signer of the note subscribed to one-eleventh for the purpose of distributing the stock over the coun- [fol. 51] try; his relationship to the bank was not such as to justify his having any more stock; it was his understanding that the stock would always be taken down on a proportionate basis, but the question never arose, and Mr. Donnally was never instructed, by him, or any one else to sell any particular stock; there was no written subscription agreement; in financial statements made by him since that time he has never shown any interest in the 220 share block of stock, and simply made a note to the effect that the note was outstanding, that he was one of eleven joint makers, and that the note was secured by the stock, but he did not specify the interest.

P. B. Porter, being recalled, testified that in March 1933, shortly after the bank closed, he gave a financial statement and did not list any interest in the 220 shares as an asset or the note as a liability.

W. Earl Crank, one of the defendants, testified that he has been Commonwealth's Attorney in Louisa County for

about twelve years, and commenced practicing there in 1916; he was director and counsel for the First National Bank of Louisa from 1927 on; increase in capital was first officially brought up in June 1930; there was discussion as to whether it could be sold in the county, and quite a few were of the opinion that it could be and they passed a resolution on that date to increase it; subsequently they had a stockholders' meeting which ratified the increase and rights to subscribe were issued terminating in about thirty days, and were sent out to all the stockholders; at the next meeting of the Board only a small amount had been subscribed and Mr. Holladay suggested that the members of the Board subscribe, each to his proportionate share of the residue of the stock, eleven of them including Mr. Donnally; it was his understanding that each agreed to take his proportionate part, one-eleventh of whatever number of shares was unsold at that time; Mr. Holladay said that Mr. Sands said they could get the money from the American Bank and Trust Company, and probably on that day the note was signed by himself and others to raise the money to pay cash for the stock; something was said about the stock paying 6% and each agreed to pay one-eleventh of the difference; the subscribers were to pay $150 a share; the stock was to be placed in Mr. Donnally's name to be put up [fol. 52] as collateral security with the note and Mr. Donnally was going to undertake to sell the stock at $150 a share; they did not buy it for profit; he never heard any suggestion of profit; he bought at $150 and was going to sell at $150; it was placed in Donnally's name as a matter of convenience in putting it up as collateral and also in selling; they expected it to be sold and distributed; the dividends were applied to interest and each of the signers paid one-eleventh of the difference; witness has no recollection of Donnally voting the stock but never heard anybody else claim any right to vote any of it.

On cross examination, witness testified that he understood the American agreed to carry the note until the stock was sold and disposed of; he never expected to pay anything on the note except interest; as far as he is concerned there was no plan as to ultimately dividing any of the stock among the different directors and issuing individual certificates; he as an individual never expected to have any of that 220 shares issued in his name personally as he

bought it for the purpose of reselling it; nothing was said about any profits if the stock had gone up to $175 or $200 and none contemplated; as to what would have happened if something else had happened that is a mere matter of guess; it is a matter of speculation whether if he had made any profits the only thing to do with them was to divide them one-eleventh; they didn't contemplate any profit and nobody thought about any profit; the stock was put entirely in the name of Jesse Donnally, Trustee, and the understanding he had was that any sales made would have to be made from the common block, and he understood no one of the directors was to sell his interest ahead of the others; as long as it was in Donnally's name as Trustee whatever sales were made had to be made from the common block; under the instructions given Donnally couldn't sell off to John Smith 5 shares of Mr. Crank's or Mr. Holladay's or Mr. Anybody Else's, as he understood them, but had to come off the 220 share block under his instructions; whatever was realized from the sale had to go on the note at American Bank until it was fully paid; he has no recollection about Donnally's voting that stock at stockholders' meetings and couldn't say; he never tried to vote any interest in it, and as far as he knows none of the others did, but may have, but he has no recollection.

[fol. 53] There is a Mr. Crank in Louisa who works in the Bank of Louisa, who is a first cousin of witness; he doesn't know what is the capital of the Bank of Louisa; the Bank of Louisa increased its capital somewhere along about the same time the First National Bank of Louisa increased its capital.

W. Worth Smith, Jr., one of the defendants, testified that he was an attorney, State Senator from the 28th Senatorial District for three terms, and a resident of Louisa County since 1911, was a director and inactive Vice-President of First National Bank of Louisa, having been a director since the bank opened; In April or May at the close of a Board meeting the matter of increasing the capital was discussed; Holladay suggested that all unite in one note of $37,500 and get the American to handle that note; he thinks Mr. Donnally figured out what would be the respective liabilities of the makers, assuming that all eleven

executed the note, and the number of shares that each director would get, and that was done by dividing in eleven equal parts; the matter was left open at that time; he was not present at the next meeting; he assumed he was buying in accordance with the first meeting, namely one-eleventh; he never really felt he was buying any, but was an accom-odation maker of the note for the benefit of the bank and depositors, and it was signed on an understanding with Mr. Holladay, Vice-President of the American Bank, or at least his understanding that the American Bank would carry the note with the stock attached until the stock had been distributed among the people of Louisa County and adjoining counties; the stock was placed in Donnally's name for convenience in order that he might distribute the stock from that block; Mr. Donnally and Mr. Porter, Cashier and President of the bank, were of the opinion that it could be distributed throughout the county within a reasonable length of time; the price at which the stock was purchased was $150 and was to be sold at $150; there was no expectation of profit and the only loss involved was the difference between the dividends on stock and the interest paid to the American Bank; the stock was paying 6% on $100 which was later reduced to 4%; the right of any one to have one-eleventh set off was not discussed.

On cross examination witness further testified that Mr. [fol. 54] Donnally figured the liability for each on the note of one-eleventh and they were buying stock in proportion to their liability on the big note; he never felt he owned any of the stock; he was looking to the American Bank to wait until that stock was sold; the American agreed to carry that note until the stock was distributed and in the meantime they were to pay the difference between the interest and the dividends; they got the dividend and added to it to make the interest, the dividend not coming to him personally, Mr. Donnally handling all of them; the dividends went into the account of J. P. Donnally, Trustee; he made payments to Mr. Donnally; he never saw the stock and never voted any of it.

On redirect examination witness stated that Donnally sent them a little notice that carried on it, "Your one-eleventh part is so much," and then they paid it in accordance with the notice; the purpose of taking all the stock in one block was to get the money and to sell the stock

immediately and closed out the transaction as far as the Government was concerned; get all the money at one time and not wait until the stock could be sold to Tom, Dick and Harry throughout the county; during that time they were simply financing it with no intention on the part of anybody to increase their individual holdings and it was put in the name of J. P. Donnally, Trustee, solely for the purpose of convenience in distribution among the prospective ultimate holders; while it was never discussed, it was his idea that any sales were to be off the whole block and Donnally was not to sell any individual's stock; the object of taking the stock in this way was not that the named persons would eventually become the owners, but the purpose was to distribute it through the sections; the eleven named persons were a sort of avenue of distribution of the stock; he had ten shares before and wouldn't assume a liability of $60,000 to get a profit on ten shares.

W. R. DUNKUM, one of the defendants, testified that he was a resident of Louisa for thirty years, a merchant and farmer, who had been a director of the First National Bank of Louisa for three or four years; when the question of selling the new stock came up he proposed to buy one-eleventh as he understood it and did buy one-eleventh of the amount they issued, 220 shares or something like [fol. 55] that had not been sold to others; the stock was issued to J. P. Donnally, Trustee, for convenience of selling the stock around to the people in the county; they thought it would help the bank's business and while he signed for it, he really wasn't able to buy this part but felt responsible for one-eleventh of it and part interest on the joint note at the American Bank, of which he paid one-eleventh when Mr. Donnally sent a notice that it was due.

THOMAS S. WINSTON, a defendant, testified that he was a member of the firm of Winston Brothers, general contractors, and a resident of Louisa County for all his life, a director and Vice-President of the First National Bank of Louisa since its organization; it was his agreement that he was to take one-eleventh of the new stock; when the

question arose as to financing the increase in capital it was agreed, after several interviews among the directors, to issue a note for the amount of the stock and the American Bank agreed to carry the note for certainly a reasonable time until the stock could be distributed; it was put in the name of J. P. Donnally, Trustee, simply as a matter of convenience in making a distribution among the people of the county or whoever would purchase it; the purpose of selling not to the directors but to the general public was to benefit the bank; the stock was purchased at $150 a share and was to be sold at $150 per share, no profit whatever being contemplated.

On cross examination witness testified that he was probably there when Mr. Donnally calculated the liability of each of the directors on the note.

Q. And the ownership of the stock was to be the same as the liability on the note?

A. Each one-eleventh.

Q. And your liability on the note was to be limited to one-eleventh?

A. Yes, sir.

Q. So your ownership of the stock and the liability on the note followed the same way?

A. Followed the same way.

He never gave a thought to a rise in the stock and never discussed anything of the kind; they hoped it would rise but nobody expected any profit out of it except the general stockholders; there was no agreement as to division [fol. 56] of profits, but they agreed to divide the losses equally, and would have shared the profit the same way as the losses were shared as far as the note was concerned.

J. P. Donnally, being recalled, testified that he purchased one-eleventh of the block of stock, whatever it might be, 250 shares or less; ten shares were taken up by the stockholders under their rights; the stock was placed in his name as Trustee in one block to save trouble in issuing stock to the public and so forth, for convenience in reselling it; they expected to sell the whole block to the public

and put it up as collateral to the note with the idea of taking it down as it was sold.

At this point the list of stockholders, Exhibit J. P. D. No. 1, was introduced as a statement by an examiner made up on information furnished by Mr. Donnally, for what it was worth.

On cross examination the witness further testified that the five charges on the ledger sheet of the account of J. P. Donnally, Trustee for L. P. Chisholm and others, were for checks to the American Bank and Trust Company for interest on the big note; he figured out the individual liability on the note several times to see what it cost him to carry the obligation; he started to make sales in the county; had orders from Washington that he could make the entries in the book and took subscriptions for several shares, ten or fifteen; he handled it on his own memoranda, did not advertise the stock but went to the different parties, and did not use any sales propotion argument; in endeavoring to sell the stock he thought he was representing the best interests of the bank, in trying to place it with influential parties in his own town that had made inquiries, and there was a selfish motice too in reducing his holding at the same time, being tied up for one-eleventh of it; they gave him complete authority to sell the stock at any time at $150; when he made a sale of ten shares he wrote the American Bank to send the block of stock and took it out of the holdings of all eleven, each having the same fractional interest in the remainder as he formerly had.

No further testimony was introduced.

[fol. 57] And thereupon the defendants rested, and the plaintiff also rested.

The jury retired.

DEFENDANTS' RENEWAL OF MOTION FOR DIRECTED VERDICT

Thereupon the defendants moved to renew the motion that the jury be directed to find a verdict for the defendants on the ground that it has been shown that this stock was held by them in these several interests, one-eleventh each, and that they are each liable for that one-eleventh part, that there is no such combination or relation between these

defendants which would justify a joint judgment for the entire amount against any one.

PLAINTIFF'S MOTION FOR DIRECTED VERDICT

Mr. McGuire: If your Honor please we, of course, object to that and we make a motion for a directed verdict on behalf of the plaintiff on the theory that we have proved this combination, we have proved the joint venture, we have proved all the elements necessary for a joint venture.

COLLOQUY

The Court: What is the effect of a motion by each side for a directed verdict? It takes the case away from the jury, doesn't it?

Mr. McGuire: I don't know.

The Court: That is what it does ordinarily. The Court doesn't have to do it but it is a very close question in my mind whether the Court will have to settle this case one way or another anyway that the verdict would go. That is the effect generally, gentlemen, when each side moves for a directed verdict. It takes the case away from the Jury, but the Judge doesn't have to do that if he doesn't so choose. I believe the later cases hold he may refuse to pass on the issue and submit it to a Jury.

Mr. McGuire: I was not aware that the two motions would take the case from the Jury.

The Court: It is discretionary with the Judge, I think, very largely. I would like to hear you fully on the law, the legal effect of this situation. There is not any very great conflict about the evidence. There is really not much issue to submit to the Jury.

Mr. Gilmer: The issues would come up on the charges to the Jury anyhow.

Mr. McGuire: I am going to withdraw our motion for the time being and take it up on the charge.

[fol. 58] NOTE.—The motion for a directed verdict was argued.

The Court: I don't have any doubt about my duty to overrule this motion. The question in my mind is whether I should submit the case to the Jury at all or not.

Mr. McGuire: Our view is that it should not be submitted to the Jury.

The Court: I haven't heard any motion to that effect.

Mr. McGuire: We make it right now.

RULING OF COURT

The Court: I think, gentlemen, that the Court should overrule the motion of the defendants to direct a verdict in favor of the defendants and sustain the motion of the plaintiff to direct a verdict for the plaintiff.

I have given as careful thought and consideration to the case as I could during the argument, trying to keep before me what I regard as the essential facts in the case about which there appears to me to be no substantial conflict, and it seems to me it would be an idle ceremony to submit the case to the Jury because if they were to find a verdict for the defendants, which I cannot conceive they should do under the law and facts of the case, the Court would have to set it aside and grant a new trial, resulting in two or more trials, whereas, if I am in error in my construction of this evidence and the law applicable to what I regard as the undisputed facts in the case, the defendants will be entitled to a verdict.

For that reason it seems to me that it would be idle to submit the case to the Jury on any charge.

In making those statements I have these points in mind: Shorn of all verbiage and all technicalities, I do not think there can be any doubt about the fact that this was a joint purchase of stock by these eleven defendants, all purchased pursuant to the one contract, whatever that contract was, at one time, and paid for by the proceeds of a joint note executed by all of the eleven defendants, to which note was attached the 220 shares of stock in question as collateral security. I believe a larger number of shares was attached originally and some of them were taken down. If I recall that part correctly, 10 shares were taken down and transferred to Mr. Donnally, the Cashier. There is a perfect and undisputed explanation of that, in that the law had been [fol. 59] amended so that a director in order to qualify as a director of a National Bank was required to be the owner of at least ten shares of stock in the bank and Mr. Donnally

was not, prior to that time, the owner of any stock; he was merely the Cashier.

Following the taking down of those ten shares, all of the purchase price of which was applied on the note for the benefit of everybody interested, that is the makers of the note, Mr. Donnally still, along with the other ten, was an owner of an undivided one-eleventh interest in the 220 shares remaining.

Up to that point there appears to be no conflict in the evidence. As I view the matter, the question finally to be determined is whether we have, in contemplation of law, only one stockholder, composed of eleven undivided interests, or whether we have eleven distinct stockholders. If it is one stockholder in contemplation of law, all of these defendants are jointly and severally liable, certainly so far as the issues in this case are concerned, for the whole amount. If there are eleven distinct stockholders, each one is liable only for his eleventh part of the assessment.

We will have to review the object which these defendants had in mind when this transaction was first conceived. This little bank, as it has been referred to, seemed to have been a very prosperous bank and had a capital stock of only $50,000. It had deposits aggregating, if I recall the testimony correctly, about $700,000. The idea was advanced by one or probably more of the directors that the capital stock was too small for the amount of deposits. It is also indicated in the evidence that they had some competition with the other bank at Louisa and it was decided by these eleven men that it was advisable and for the best interests of the bank to increase its capital stock from $50,000 to $75,000. In that connection it is rather difficult to get away from the fact that these eleven men were, for all practical purposes, the bank itself, the undisputed evidence showing they owned seventy-five per cent of the entire capital stock, so that anything they did to further the interests of the bank certainly inured at least indirectly to their personal benefit. The problem with which they were confronted was disposing of the 250 additional shares.

I assume under the law applicable to National Banks that the then stockholders would have had the first right to sub- [fol. 60] scribe to the additional holdings in proportion to their then present holdings. They do not seem to have desired to follow that plan but they wanted, as far as they

could, to distribute the 250 additional shares throughout the community to make the holdings more extensive and thereby increase the bank's business, increase its deposits and increase its loans. In handling this as they did they had an object in view, to distribute that stock throughout said community as far as possible, and into the hands of as many different holders so as to increase the bank's business, thereby benefitting the bank and thereby benefitting themselves as interested parties in this bank. In addition to that they had the further object—and I do not see how there could be any controversy about the evidence on that point—of maintaining the price of the stock. Manifestly if this stock was distributed into eleven different holdings, separate and distinct one from another, some of whom were financially able to carry it indefinitely and others of whom were unable to carry it, sooner or later some would sell, thereby creating competition in the market and consequent reduction in the price. So they had the second object in view and that was to maintain the price at $150.

At first I was inclined to attach much importance to the fact that these men did not have in view buying this stock, forming a pool and selling it at a price above what they paid for it. I think it is patent that they did not contemplate selling it at more than $150 a share, but I do not think that is at all controlling in a case of this kind. It is one feature, but it is not controlling. They had then to form some plan to effect the objects that they had in mind, namely, the distribution of that stock throughout that community and maintaining the price of $150 a share. By very informal proceedings but proceedings of undoubted purport, they constituted the Cashier of the bank, Mr. Donnally, as their Trustee to hold this stock.

The question arises—for what purpose and for whom was Mr. Donnally Trustee? There is no evidence here, gentlemen, that Mr. Donnally was the Trustee to hold twenty or twenty-two shares for Mr. Chisholm or Mr. Winston or for any one, or to hold any particular number of shares for any particular person, but the evidence is that Mr. Donnally was the Trustee to hold 220 shares—at first a greater number—for the joint benefit of all of these eleven [fol. 61] directors. He was not holding any particular number of shares for Director A or Director B who would call on him from time to time and take it down and sell it; he

was holding the entire block for the benefit of all of these men for certain purposes and one purpose was to sell the stock from time to time in the community there to people other than the eleven, at the price of $150 a share, and when he made the sale of five shares or ten shares he did not sell Mr. A's stock or Mr. B's stock; he was to sell five or ten shares from the entire block. There is no conflict about that. The sale was for the benefit of all. It was a part of each undivided eleventh interest in that entire block of stock.

I think there was present a strong community of interest for a common purpose, to further a purpose common to all of these eleven men. There can be no doubt about that under this evidence. Mr. Donnally was Trustee for all of them.

The fact that if they had terminated their arrangement, informal as it was, each man upon getting that note out of the way would have been entitled to come up and receive twenty shares I do not think is entitled to great weight. The important point is what particular shares, if any, was he entitled to receive at the inception of the transaction, and I am bound to conclude none. He merely had an undivided one-eleventh interest in the entire block which was kept in a block under control of a Trustee for certain purposes, all of which inured to the common benefit of all. He was not Trustee for any particular man, for any particular stock, but Trustee for all eleven for the benefit of all eleven in the handling of the entire block of stock. Under those circumstances, gentlemen, I do not see how you can escape the fact that the evidence about which there is no conflict, shows that this was a joint ownership of this stock for a common purpose. It may not have been such community of interest as constituted a partnership; I do not think it was, but I also do not think that is necessary in a case of this kind, to make those who are interested in a block of stock jointly and severally liable, when an assessment is duly made by the Comptroller of the Currency.

I assume you gentlemen, particularly the defendants, have made a thorough search of the authorities and I am frank to say that no cases seem to be directly in point. The case of English v. Gamble, 26 Fed. (2nd) 28, from the 8th [fol. 62] Circuit, I think in principle is in point. While the point does not seem to have been argued at any great

length, the Court clearly held that those directors, under circumstances that were substantially similar to those here presented, owned the stock in question jointly. I think this case, if anything, is stronger for the reason that the entering into this relationship by these eleven defendants was a purely voluntary act on their part. They went into it, so to speak, with their eyes open, voluntarily, whereas in the case of English v. Gamble the directors were practically forced into it by the threat of the Comptroller of the Currency to close the bank if they did not do so.

Under all of these circumstances about which there seems to be no dispute, I do not see how there can be but one proper verdict, and that is a verdict for the plaintiff for the full amount. There is no question of fact for the Jury to decide. I think the defendants very properly in their motion have apparently conceded that.

It appears from the record that pleas of bankruptcy have been filed in this proceeding by the defendants, W. Worth Smith, Jr., P. B. Porter, J. P. Donnally and C. L. Perkins. It is further conceded by counsel for the plaintiff that the receiver has filed proofs of claim in bankruptcy against the defendants P. B. Porter, H. W. Porter, W. Worth Smith, Jr., J. P. Donnally and C. L. Perkins. Upon that showing the Court will dismiss the proceedings as to those five defendants.

Mr. Gilmer: Mr. May has suggested this: If these gentlemen are going to appeal he will concede the joint liability against U. M. Gentry's estate and if the appeal does not stand he wants to take advantage of it.

NOTE.—The Jury returned.

ORDER DIRECTING VERDICT

The Court: Gentlemen of the Jury, the view that the Court takes in this case is that it depends entirely upon the question whether or not these defendants owned this stock jointly. The Court has reached the conclusion from the undisputed facts that it was a joint ownership and therefore, being a joint ownership, defendants are jointly and severally liable for the entire amount instead of each one being liable for only one-eleventh and accordingly I

direct you to return a verdict against five of these defend-
[fol. 63] ants for the full amount. Five of them have filed petitions in bankruptcy and they will be dismissed. The verdict will be, "We, the Jury, at the direction of the Court, find in favor of the plaintiff against the defendants W. R. Dunkum, T. S. Winston, W. Earl Crank, Waller Holladay and L. P. Chisholm, in the sum of $22,000, together with interest from January 22, 1934, until paid". It turns on a point of law in the view I take and there is no issue of fact to submit to the Jury. Five other defendants have gone in bankruptcy and they have been discharged of the liability. The case as to one other is continued, on the ground of alleged mental incompetency, for trial later.

Mr. Fulton: We note an exception to the action of the Court in overruling the motion to direct a verdict for defendants and to the action of the Court in sustaining plaintiff's motion for a directed verdict.

MOTION TO SET ASIDE VERDICT

Mr. Walsh: We make a motion to set aside the verdict.

ORDER SETTLING BILL OF EXCEPTIONS

And on motion of the defendants this bill of exceptions is signed and sealed this 9th day of September, 1935.

(Sgd.) Luther B. Way, Judge. (Seal.)

On this September 9, 1935, it is ordered that the foregoing bill of exceptions be, and the same hereby is filed and made a part of the record within the time allowed by law and the rules of the Court.

(Dgd.) Luther B. Way, United States District Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME FOR FILING BILLS OF EXCEPTION—Entered & Filed August 7, 1935

On motion of the defendants, in view of the absence of Honorable Luther B. Way, before whom the above entitled case was tried from this district.

[fol. 64] It is ordered that the time within which the defendants may tender Bill of Exceptions to the Court to be signed and made part of the record be extended to and including September 10th, 1935.

(Sgd.) I. M. Meekins, United States District Judge.

August 7, 1935.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME TO FILE RECORD ON APPEAL WITH THE CLERK OF THE U. S. C. C. A.—Entered & Filed September 10, 1935

For good cause shown it is ordered that the time within which the record on appeal in the above-entitled case may be filed with the Clerk of the United States Circuit Court of Appeals, at Richmond, Va., be, and the same hereby is, extended for a period of thirty (30) days from the date hereof.

(Sgd.) Luther B. Way, United States District Judge.

September 10, 1935.

IN UNITED STATES DISTRICT COURT

STIPULATION TO PREPARE AND PRINT THE TRANSCRIPT OF RECORD ON APPEAL IN ACCORDANCE WITH RULE 23, OF THE CIRCUIT COURT OF APPEALS—Filed September 28, 1935

It is stipulated that the transcript of the record may be made and the record printed in accordance with the Provi-

[fol. 65] sions of Rule 23 of the United States Circuit Court of Appeals, Fourth Circuit.

(Sgd.) H. W. Walsh and M. J. Fulton, Counsel for Appellants. (Sgd.) George Gilmer, Murray M. McGuire, Counsel for Appellee.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OF CLERK RE APPEAL PAPERS

Petition for appeal, filed July 2, 1935.

Order allowing appeal and fixing amount of appeal bond, entered and filed July 2, 1935.

Appeal and supersedeas bond, filed July 2, 1935.

Dated July 2nd, 1935.

Obligors: L. P. Chisholm, Waller Holladay, W. Earl Crank, T. S. Winston and W. R. Dunkum, as principals, and John R. Morris as surety.

Penalty: Twenty-six Thousand Dollars ($26,000.00).

Conditioned to pay all damages and costs.

Citation, issued July 2, 1935

Legal service accepted on September 20th, 1935, by Murray M. McGuire, Esq., of counsel for appellee.

[fol. 66] IN UNITED STATES DISTRICT COURT

STIPULATION OF COUNSEL AS TO WHAT SHALL CONSTITUTE RECORD ON APPEAL—Filed September 28, 1935

It is stipulated, pursuant to #3 of Rule 14 of the Circuit Court of Appeals, that the following portions of the record and proofs in the above entitled case shall be included in the transcript of the record for use in the Circuit Court of Appeals, Fourth Circuit, on appeal:

(1) The Notice of Motion for Judgment.
(2) Pleas in Abatement.
(3) Demurrer and Motion to Strike Pleas in Abatement.
(4) Motion to Dismiss for Lack of Jurisdiction.

(5) All other pleadings and all grounds of Defense.
(6) Motion to Set Aside Verdict.
(7) Bill of Exception No. 1, signed July 2nd, 1935.
(8) Bill of Exceptions No. 2, signed September 9th, 1935.
(9) All Orders of the Court, including orders of August 7th and September 9th, 1935.
(10) Assignments of error.
(11) Citations.

(Sgd.) H. W. Walsh and M. J. Fulton, Counsel for Appellants. (Sgd.) George Gilmer, Murray M. McGuire, Counsel for Appellee.

[fols. 67 & 68] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 69] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 3970

L. P. CHISHOLM, WALLER HOLLADAY, W. EARL CRANK, T. S. WINSTON and W. R. DUNKUM, Appellants,

versus

W. B. GILMER, Receiver for the First National Bank of Louisa, Louisa, Virginia, Appellee

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond

DOCKET ENTRIES

October 9, 1935, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bond, and citation are certified up under section 7 of Rule 14.

Same day, the appearance of H. W. Walsh and M. J. Fulton is entered for the appellants.

October 11, 1935, the appearance of Murray M. McGuire and George Gilmer is entered for the appellee.

October 15, 1935, stipulation as to time for the filing of the respective briefs is filed.

October 18, 1935, twenty-five copies of the printed record are filed.

[fol. 70] ARGUMENT OF CAUSE

December 3, 1935, (November term, 1935,) cause came on to be heard before Parker and Northcott, Circuit Judges, and Chesnut, District Judge, and is argued by counsel and submitted.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3970

L. P. CHISHOLM, WALLER HOLLADAY, W. EARL CRANK, T. S. WINSTON and W. R. DUNKUM, Apellants,

versus

W. B. GILMER, Receiver for the First National Bank of Louisa, Louisa, Virginia, Appellee

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond

(Argued December 3, 1935. Decided January 6, 1936)

Before Parker and Northcott, Circuit Judges, and Chesnut, District Judge

[fol. 71] H. W. Walsh and M. J. Fulton for Appellants, and Murray M. McGuire and George Gilmer (Gilmer and Graves, and McGuire, Riely & Eggleston on brief) for Appellee.

OPINION—Filed Jan. 6, 1936

PARKER, Circuit Judge:

This is an appeal in an action instituted to enforce the statutory liability of stockholders of a national bank against whom an assessment had been made as provided by statute. The action was instituted by the bank's re-

ceiver, by notice of motion for judgment under the Virginia practice, against one L. P. Chisholm and ten other persons, who were alleged to have subscribed, in the name of a trustee, to 230 shares of stock of the bank as joint adventurers and to have been the real owners of 220 of the shares, which were held in the name of the trustee, at the time of the bank's failure. The action was dismissed against five of the defendants because of their having received discharges in bankruptcy. It was continued as to one whose administrator interposed a defense of insanity. And it was tried against Chisholm and four others, who first pleaded in abatement that no writ had issued against them and that the action could not be prosecuted on notice of motion for judgment under the Virginia statute without service of process, and afterwards excepted to the order ruling them into trial, after the cause had been continued as to one of the defendants.

At the conclusion of the evidence, both sides moved for a directed verdict, and the trial judge directed verdict for plaintiff for the sum of $22,000 with interest from the date of the stock assessment. From judgment on this verdict, Chisholm and the other four defendants against whom judgment was rendered bring this appeal, contending (1) that the action could not be instituted by notice of motion without service of process by the marshal and that the plea in abatement should have been sustained; (2) that there was error in trying the case on the joint liability after it had been continued as to one of the defendants; and (3) that, on the facts, there was no joint liability on the part of the defendants for the stock assessment, and that it was [fol. 72] therefore erroneous to deny their motion for directed verdict and to direct verdict against them.

The procedural questions can be briefly disposed of. It has been recently decided by this court, after full consideration, that notice of motion for judgment under the Virginia practice is a proper method of procedure for enforcing the statutory liability of a stockholder of an insolvent national bank, and that, on such notice of motion, it is not necessary that writ or other process be served by the marshal to bring defendants into court. Ely v. Gamble (C. C. A. 4th), 75 Fed. (2) 171. And we think it equally clear that under the Virginia practice it was proper to proceed against appellants notwithstanding the continu-

ance as to one of the defendants. It is true that the liability of defendants was joint; but the action was one for the recovery of money, and Section 6047 of the Code of 1930 provides:

"Sect. 6047. *Against whom of those liable, judgment may be given on motion.*—A person entitled to obtain judgment for money on motion may, as to any or the personal representatives of any person liable for such money, move severally against each, or jointly against all, or jointly against any intermediate number; and when notice of his motion is not served on all of those to whom it is directed, judgment may nevertheless be given against so many of those liable as shall appear to have been served with the notice, but the judgment against such personal representative shall, in all cases, be several. Such motions may be made from time to time until there is judgment against every person liable, or his personal representative."

And it is well settled that the liability of the stockholder is contractual, being based upon his original stock subscription. Richmond v. Irons, 121 U. S. 27, 55; Matteson v. Dent, 176 U. S. 521, 525. As said by Chief Justice White in the case last cited, "the obligation of a subscriber to stock, to contribute to the amount of his subscription for the purpose of the payment of debts, is contractual, and arises from the subscription to the stock." This being true, there can be no doubt of the right of plaintiff to proceed to judgment against a part of the defendants jointly liable for the subscription under Section 6265 of the Code of 1930, without proceeding against the others. The perti- [fol. 73] nent portion of that statute is as follows:

"Upon all contracts hereafter made by more than one person, whether joint only or joint and several, an action or motion may be maintained and judgment rendered against all liable thereon, or any one or any intermediate number, and if, in an action on any contract heretofore or hereafter made, more than one person be sued and process be served on only a part of them, the plaintiff may dismiss or proceed to judgment as to any so served, and either discontinue as to the others, or from time to time as the process is served, proceed to judgment against them until judgment be obtained against all."

Coming to the merits of the case, we note that at the conclusion of the testimony both sides moved for a directed verdict. It is well settled that this amounts to a waiver of jury trial and a consent that the trial judge decide the issues and direct a verdict accordingly; and in such case, upon exception to an adverse finding and direction, the only question is whether the verdict as directed is supported by substantial testimony. In other words, the verdict must stand unless the party against whom it has been directed was entitled to have it directed in his favor. Williams v. Vreeland, 250 U. S. 295; Sena v. American Turquoise Co., 220 U. S. 497, 501; Buettell v. Magone, 157 U. S. 154; Barringer v. Dinkler Hotels Co. (C. C. A. 4th), 61 Fed. (2d) 82, 83; Swift & Co. v. Columbia Ry. Gas & Electric Co. (C. C. A. 4th), 17 Fed. (2d) 46, 49; Lawton v. Carpenter (C. C. A. 4th), 195 Fed. 362. The only question left for our determination, therefore, is whether, upon the evidence, defendants were entitled to a directed verdict. We agree with the judge below that they were not.

The eleven defendants against whom the suit was brought constituted the board of directors of the First National Bank of Louisa, Va. They owned 75% of the capital stock of that bank, which was only $50,000.00, and they owed the bank $47,371.00 on their own notes and were liable to it on loans to others to the extent of $48,971.00. It was thought that the deposits of the bank, amounting to six or seven hundred thousand dollars, were out of proportion to the capitalization and that it would be advan- [fol. 74] tageous to increase the capital stock by 50% and sell the new stock as widely as possible among the citizens of the county where the bank was located. Increase of capital stock was accordingly authorized and the price of the new shares was fixed at $150.00. Notice of the right to subscribe was given stockholders, but only a very few shares were sold in this way and none to the directors themselves.

In order to float the stock and distribute it in the county without depressing the price of $150.00 per share, the directors agreed to purchase the stock and hold it until it could be resold and to resell it if possible among the people of the county. The directors thereupon did subscribe for 230 shares of the stock in the name of J. P. Donnally, one of their number, as trustee, and raised the money to meet

their subscription by borrowing from another bank and executing their joint note for the amount. The stock was issued to and held by Donnally as trustee. He collected the dividends thereon and applied them toward paying the interest on the note, the additional amounts necessary for that purpose being put up by the directors. Ten shares of the stock thus purchased were sold, and the proceeds thereof were applied on the note.

Several of the defendants took the stand and testified that each was to own one-eleventh of the stock purchased; but it is clear that, while each had a one-eleventh interest in the enterprise, the stock was purchased as a result of the joint action of all, that it was paid for with the proceeds of a note that they executed jointly, that it was held in trust for their joint use and benefit, that they shared in the losses sustained as a result of the purchase, that the dividends received were applied for their joint benefit, that each had an equal voice in the management of the enterprise and that they would have shared equally in profits, if profits had been realized.

It is true that defendants did not expect to realize any direct profit from the resale of the stock, but the purchase and resale were intended to benefit them in ways other than the realization of a direct profit. The increase in the capital stock of the bank was necessary in view of the size of the deposits; and no one would benefit from this increase as much as would directors who owned 75% of the stock [fol. 75] and whose debts to the bank exceeded the capitalization. The purchase of the stock was clearly undertaken in an effort to strengthen the bank in which they were interested; and, that it was in fact a joint enterprise on the part of the directors, and not one which assumed the appearance of such an enterprise by accident, is shown by the fact that, while a number of the directors were financially unable to make purchases on their own account, the purchase went forward notwithstanding this fact. Only on the theory that the enterprise was engaged in by the board in a joint effort to strengthen the bank, can the fact be expained that the financially strong directors entered into the purchase with those who were unable to carry their part of the load. And this in effect is the testimony

of the defendant Chisholm. He said in explanation of why the matter was handled as it was:

"When he (Chisholm) gave that note he had a pretty good account, perhaps $15,000.00 and could have written a check for two or three times his one-eleventh, but did not do it because he agreed to take one-eleventh, some of them were not able to pay cash and all agreed to sign the note in order to go along so Mr. Donnally would have authority to sell it any time he got ready; they weren't able and we all agreed we would carry it along; Mr. Perkins said he was able, he offered to pay it same as witness and get his stock, and he agreed like witness to go along with the others on that note; some said they were not able to pay their part and decided it was best for the bank for all to carry it on together."

C. L. Perkins, one of the defendants, testified:

"He (Perkins) agreed to try to pay one-eleventh instead of going on the big note, didn't want to go on any of it; was ready, willing and able to pay his one-eleventh; didn't mind owning one-eleventh at that time, but they said that they wanted the stock in order to distribute it around among the people and he already owned twenty shares of it then, and 'they didn't want us to own any more,' they wanted to distribute it around amongst the others.

"Q. And they wouldn't agree for you to pay your one-eleventh and stay off the note, would they?

A. No, sir. I asked about the note and, as I thought, the [fol. 76] understanding was when they got this stock and got straightened out some of them said they didn't have the money and I don't know that anybody else really said they wanted to pay or anything of the sort, but I never had signed a note for other people and I didn't want to go on that one but I did go on it after they told me that the capital in the bank was more than the capital stock of the bank and that was the way they claimed to be taking it out, was to take care of that."

It is clear, we think, that, with respect to the purchase, holding and sale of the stock in question, the defendants were engaged in a joint enterprise. Of course they were not partners generally, but they unquestionably assumed

the relationship of partners with respect to this particular undertaking; and that is the essence of a joint adventure. Dexter & Carpenter v. Houston (C. C. A. 4th) 20 Fed. (2d) 647; Joring v. Harris (C. C. A. 2d) 292 Fed. 974; Reid v. Shaffer (C. C. A. 6th) 249 Fed. 553; In re Kessler & Co. 174 Fed. 906; Van Tine v. Hilands, 131 124; Delmonico v. Roudebush, 5 Fed. 165; Lyles v. Styles, 15 Fed. Cas. p. 1143, No. 8625; 33 C. J. 842; 15 R. C. L. 501; note 48 A. L. R. 1062 and 63 A. L. R. 914. Although combination for the purpose of making profits is ordinarily characteristic of a joint adventure, the purpose of making direct profits is no more essential to that relationship than to that of partnership. A joint adventure, we think, exists when two or more persons combine in a joint business enterprise for their mutual benefit, with an express or implied understanding or agreement that they are to share in the profits or losses of the enterprise, and that each is to have a voice in its control and management. It differs from a partnership in that it is ordinarily, although not necessarily, limited to a single transaction, whereas a partnership is ordinarily formed for the transaction of a general business (33 C. J. 842), and in that the interest of the joint adventurer may be recovered at law, and accounting in equity need not be resorted to as in case of partnership. Joring v. Harriss, supra. The relationship was defined by Judge Hough of the Second Circuit, in the case last cited as "a commercial enterprise by several persons jointly."

As was held in Bowmaster v. Carroll (C. C. A. 10th) 23 Fed. (2d) 825, upon which plaintiff relies, the purchase of property by two or more persons, each of whom con-
[fol. 77] tributes a portion of the purchase price, makes them joint owners of the property, but does not, without more, establish between them the relation of joint adventurers. 33 C. J. 842. But there is much more shown here than the mere purchase of the stock. That purchase was made, not as an end in itself, but as a means of strengthening the bank, an object in which all of the directors were interested. The purchase was a joint purchase, made with the proceeds of a joint loan for which a joint note was executed. The purchase was made in order that the stock might be resold to the advantage of the bank and its stockholders and it was placed under the control of a trustee in order that sales might be made by him. The dividends,

which were profits derived from holding the stock, were applied on the joint obligation incurred in connection with its purchase; and the funds necessary to pay the interest on the joint note, and thus to continue to carry the stock, were raised by equal contributions from all the defendants. Each had an equal voice in the control and management of the enterprise; and there can be no doubt but that the intention was that all should share equally any profits and losses resulting therefrom. If secret profits had been made by one of the defendants in connection with the handling of the stock, he could unquestionably have been required by the others to account therefor. In other words, what we have is not a mere acquisition of property by two or more persons, but an enterprise entered upon by them to acquire, hold and sell additional stock of a bank for the purpose of strengthening that institution in which they were interested, with the acquisition of the stock as one of the steps in that enterprise.

There can be no question as to the responsibility of the joint adventurers for liabilities incurred within the scope of the enterprise. 15 R. C. L. 505; 33 C. J. 871-873. And certainly it is too clear for discussion that a stock assessment on stock purchased in the carrying on of the enterprise is such a liability.

And we think that the same result follows if the relationship of the defendants as joint adventurers be ignored. Unquestionably they made a joint subscription for the stock through their trustee; and, if the suit were on this joint subscription, there would be no question as to their joint liabil- [fol. 7[illegible]] ity for the entire subscription price. Williston on Contracts Sec. 322; New Hayen & Northampton Co. v. Hayden, 119 Mass. 361 (Per Gray, J.); First Trust Co. v. Miller, 160 Wis. 336, 151 N. W. 813; Foot v. Great Northern R. Co., 81 Minn. 493, 84 N. W. 342, 52 L. R. A. 354; 14 C. J. 538. As the subscription was a joint subscription and the stock was held in trust for the subscribers jointly, the liability for stock assessment was also joint, being "contractual and arising from the subscription to the stock." Matteson v. Dent, 176 U. S. 521, 525; Richmond v. Irons, 121 U. S. 27, 55. If the trustee had subscribed for stock for each of the defendants individually, a different situation would be presented, even though one block of stock had been issued to him as trustee; but this is not what happened. He subscribed for the defendants jointly and held the shares of

stock which were issued upon the subscription for their joint use and benefit, to be devoted to a joint purpose and not to be divided among them. Not only was there no subscription for the defendants individually, but none of them could have required the trustee to allot to him his interest of the stock in severalty.

A case very much in point is English v. Gamble (C. C. A. 8th), 26 Fed. (2d) 28. In that case the stock of a national bank had been assessed and, upon failure of some of the stockholders to pay the assessment, the directors put up the deficiency. Afterwards the stock of the defaulting stockholders was sold and was purchased by a trustee for the directors who had made good the deficiency and he thereafter held the stock for their benefit. Subsequently the bank failed and a stock assessment was levied against the directors jointly for the amount of the stock held in trust for them by the trustee. In holding the directors liable for the assessment, the Circuit Court of Appeals of the Eighth Circuit said: "Shorn of all technicalities, clearly this made the defendants the joint owners of this particular stock which was still held by them in the name of the trustee at the time the bank closed its doors. As such joint owners they became jointly and severally liable for the subsequent assessment."

There was no error and the judgment appealed from will be affirmed.

Affirmed.

[fol. 79] In United States Circuit Court of Appeals, Fourth Circuit

No. 3970

L. P. Chisholm, Waller Holladay, W. Earl Crank, T. S. Winston and W. R. Dunkum, Appellants,

vs.

W. B. Gilmer, Receiver for the First National Bank of Louisa, Louisa, Virginia, Appellee

Appeal from the District Court of the United States for the Eastern District of Virginia

Judgment—Filed and Entered January 7, 1936

This cause came on to be heard on the transcript of the record from the District Court of the United States for the

Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs.

John J. Parker, Senior Circuit Judge.

January 7th, 1936.

[fol. 80] In United States Circuit Court of Appeals

Order Staying Mandate—Filed January 25, 1936

Upon the application of the Appellants, by their counsel, M. J. Fulton and H. W. Walsh, and for good cause shown, it is

Ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the application of the said Appellants in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the said Supreme Court within 40 days from this date.

John J. Parker, Senior Circuit Judge.

January 25, 1936.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 81] Supreme Court of the United States

Order Allowing Certiorari—Filed April 13, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, limited to the question of the jurisdiction of the District Court.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied

the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 40,382. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 828. L. P. Chisholm, Waller Holladay, W. Earl Crank et al., petitioners, vs. W. B. Gilmer, Receiver for The First National Bank of Louisa, Louisa, Virginia. Petition for a writ of certiorari and exhibit thereto. Filed March 14, 1936. Term No. 828, O. T., 1935.

FILE COPY

MAR 14 1936

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

TERM, 1936

No. [redacted] 11

L. P. CHISHOLM, WALLER HOLLADAY, W. EARL CRANK, T. S. WINSTON AND W. R. DUNKUM,
Petitioners,

versus

W. B. GILMER, RECEIVER FOR THE FIRST NATIONAL BANK OF LOUISA, LOUISA, VIRGINIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MINITREE JONES FULTON
and HERMAN W. WALSH,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

TERM, 1936

No. .....

L. P. CHISHOLM, WALLER HOLLADAY, W. EARL CRANK, F. S. WINSTON AND W. R. DUNKUM, Petitioners,

versus

W. B. GILMER, RECEIVER FOR THE FIRST NATIONAL BANK OF LOUISA, LOUISA, VIRGINIA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your above named petitioners pray for a writ of certiorari to the Circuit Court of Appeals of the United States for the Fourth Circuit to review its final judgment in this case, entered on January 7, 1936 (R. 79). A transcript of the record of the case, including the proceedings in the Circuit Court of Appeals, has been filed herewith in accordance with Rule 38 of this Court.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This case was instituted on May 12, 1934, by a notice of motion filed in the United States District Court for the Eastern District of Virginia, sitting at Richmond, by W. B. Gilmer, Receiver for the First National Bank of Louisa, Virginia, Respondent, to recover $22,000.00 with interest from January 22, 1934, against your petitioners and Charles S. Perkins, W. Worth Smith, Jr., P. B. Porter, Hunter W. Porter, Administrator of B. W. Porter, deceased, J. F. Bickers, Sheriff Administrator of U. M. Gentry, deceased, and J. P. Donnaly in his own right and as Trustee for all of the above named petitioners, as an assessment alleged to have been made by the Comptroller of the Currency of the United States on 230 shares of the capital stock of the insolvent First National Bank of Louisa, Virginia, of the par value of $100.00 a share, alleged to have been purchased by them after having formed a special combination of themselves to buy said stock for profit, as alleged adventurers and owners thereof, and alleging that they weer jointly and severally liable for such assessment on said stock registered on the books of the bank in the name of J. P. Donnaly as Trustee for L. P. Chisholm and others. The judgment was asked against the nine living defendants and the two administrators of the above named decedents (R. 2-3).

PLEAS IN ABATEMENT AND MOTION TO DISMISS AND DEMURRERS

Petitioners, residents, and citizens of the District and of Virginia, on May 28, 1934, filed their several pleas of abatement and motions to dismiss the notice of motion for judgment on the grounds that it was void and of no effect and that no such action could be maintained in the United States District Court by a notice of motion merely signed and issued by respondent and not under the seal of the Court, nor signed by the clerk, and not bearing the teste of the District Judge (R. 5-10), and that the District Court was without jurisdiction to entertain such proceedings.

The District Court overruled these and sustained this mode of instituting the suit in the United States District Court. Exception was taken to this ruling and assigned as error (R. 26).

Demurrers to this notice of motion were then interposed by petitioners and the notice of motion was amended and the demurrers were then again filed to the amended notice of motion (R. 15), and were overruled and petitioners excepted and assigned error (R. 14-15, 26-28).

PLEAS OF BANKRUPTCY

Pleas in bankruptcy were then filed by J. P. Donnaly, P. B. and H. W. Porter, C. L. Perkins, and W. Worth Smith, Jr. (R. 22-23).

PLEAS OF GENERAL ISSUE

Petitioners plead the general issue and filed grounds of defense, U. M. Gentry's Administrator, relying on insanity of his intestate (R. 4, 15-19).

The grounds of defense were: (1) Petitioners denied that they had purchased or subscribed, either individually or jointly, for the 230 shares of capital stock of the Bank of Louisa; (2) denied that they had entered into any special *combination* for the purpose of buying said shares of stock for profit; (3) admitted that each of them had purchased for himself one-eleventh part of the 230 shares of the capital stock of the Bank and stated that the interest of each of them therein *was to that extent only;* (4) each of the petitioners denied that he was a joint owner thereof and denied that each of them was liable for the payment of the whole amount of the assessment alleged to have been made on the 230 shares of stock (R. 18-19).

PROCEEDINGS AT TRIAL

At the trial, on April 25, 1935, U. M. Gentry's Administrator moved that the case be continued as to him by reason of his having filed a plea of insanity on the part of his decedent at the time of the alleged transaction. Petitioners objected to this continuance on the ground that the alleged suit was *joint* against eleven defendants, and only a joint judgment could be entered binding upon all. This motion was overruled and an exception was noted and assigned as error (R. 31-32).

Upon the trial petitioners objected to the admission of certain evidence and exceptions were noted and assigned error (R. 23-33, 34, 39-41, 44, 46).

At the conclusion of respondent's evidence, petitioners moved for a directed verdict in their favor on the grounds that the evidence showed that each of them had purchased and were owners individually of only one-eleventh interest in the 230 shares of stock and that it had not been shown that they had formed a special combination or a *joint* adventure or partnership for profit or that each was jointly liable

for this payment of the whole of this alleged assessment on the 230 shares. This motion was overruled and exception noted and assigned as error (R. 46).

Petitioners then introduced their evidence and at the conclusion of all the evidence again moved for a directed verdict in their favor on the same grounds, which was overruled and exception noted and assigned as error (R. 57-63).

Respondent who had also *previously* moved for a directed verdict and had then withdrawn it until after the Court had announced it would overrule petitioners' motions, then again moved for a directed verdict in his favor, which motion was granted and exception was noted and assigned as error (R. 58-63).

The jury thereupon rendered the following verdict:

"We, the jury, at the direction of the Court, find in favor of the plaintiff against the defendants W. R. Dunkum, Thomas S. Winston, W. Earl Crank, Waller Holladay, and L. P. Chisholm, in the amount of $22,000.00 (Twenty-two thousand dollars) together with interest from January 22nd, 1934, until paid" (R. 23, 63).

Petitioners thereupon moved to set aside the verdict of the jury and grant a new trial on grounds specifically stated, which motion was overruled and the Court entered judgment on the verdict, and exception was noted and assigned as error (R. 22-26, 63).

ASSIGNMENTS OF ERROR

Petitioners thereupon filed their assignments of error (R. 26-28) and filed their bills of exception within the time

prescribed by law (R. 28, 64).

An appeal was thereupon allowed to the Circuit Court of Appeals of the United States for the Fourth Circuit which, on January 6, 1936, after hearing it, affirmed the judgment of the District Court with costs (R. 79).

QUESTIONS INVOLVED AND PRESENTED IN THIS PETITION ARE:

I

The Circuit Court of Appeals for the Fourth Circuit in overruling petitioners' pleas in abatement and motion to dismiss the notice of motion for judgment and in affirming the judgment of the District Court and dismissing the appeal has erred and rendered a decision which has misconstrued and misapplied the Revised Statutes of the United States, Section 911 (Title 28 USCA Section 721), on the ground that the notice of motion was a *process* and was not under the seal of the Court, nor signed by the clerk, and did not bear teste of the District Judge, and that it was without jurisdiction to entertain such proceedings, and that the United States Marshal was likewise without authority to serve said notice of motion under Section 911 of the Revised Statute (Title 28 USCA, Section 721), and that the District Court and the Circuit Court of Appeals never acquired jurisdiction at all over petitioners by a valid service of a valid process. In such a case there was an entire want of jurisdiction and the judgment of the Circuit Court of Appeals for the Fourth Circuit was erroneous, and in conflict with the decisions of the Circuit Courts of Appeal of other Circuits and of this Court, and has thus created a conflict in the decisions on this important matter of federal law which should be settled by this Court.

II

The Circuit Court of Appeals for the Fourth Circuit has erred in affirming the judgment for $22,000.00 of the District Court only against the five petitioners jointly, on a notice of motion alleging that the liability for the payment of this assessment was *joint* as to all of the eleven defendants and then continuing this action as to one of the defendants, U. M. Gentry's Administrator, and thereby discontinued this action as to him, and that the Circuit Court of Appeals has thus decided an important question of substantive federal law in a way probably untenable and in conflict with the weight of authority and with the applicable decisions of this Court.

III

The Circuit Court of Appeals for the Fourth Circuit has erred in rendering a decision affirming the judgment of the District Court in holding that the liability of petitioners for the payment of the alleged assessment made by the Comptroller of the Currency upon the 230 shares of stock of the insolvent National Bank of Louisa, Virginia, was "contractual," and each of the petitioners were jointly liable for the payment of the whole of the $22,000.00, the amount of the assessment, and that it was *not an individual statutory liability* only to the extent each had invested in the 230 shares under Title 12, USCA Section 63 and 64, and has thus misconstrued this federal statute, and erroneously decided an important question of federal law, and has construed and applied it in a way probably in conflict with the statute and the applicable decisions of the other Circuit Courts of Appeal ~~and of this Court~~, and that this important federal question which has not been, but should be decided and settled by this Court.

IV

The Circuit Court of Appeals for the Fourth Circuit has misconstrued and misapplied Title 12, USCA, Sections 63 and 64, in affirming the judgment of the District Court for $22,000.00 against your petitioners and refusing to grant petitioners' motion for a directed verdict in their favor made first at the end of respondent's evidence (R. 46), and again at the end of *all* of the evidence (R. 57), and in doing so has misconstrued and misapplied Title 12, USCA, Sections 63 and 64, under which statute the shareholders of the National Bank Associations are made *"individually"* responsible, *and not one for another and only to the extent of the amount invested by each in the stock thereof*, at the par value thereof, in addition to the *amount* invested in such shares by each of them "individually"; and has erred in holding that each of your petitioners was "jointly" liable for the payment of the whole amount of the alleged assessment, ten times more than the amount "invested individually" by each of them in such shares, and in *later* directing a verdict (R. 23, 62) for respondent on his motion which was not made until *after* the District Court had announced that it would overrule petitioners' motions for a directed verdict (R. 58), and in holding that the evidence on respondent's motion for a directed verdict was so far undisputed or of such a character as would have made it the duty of the District Court, as a matter of law, to direct a verdict for respondent. The decision of the Circuit Court of Appeals has thus misconstrued and misapplied this federal statute and the evidence and has misinterpreted both and has decided an important question of federal law in a way that is untenable and in conflict with the evidence and the weight of authority and of the applicable decisions of other Circuit Courts of Appeal and of this Court, and has so far departed from the accepted and usual course of

judicial proceedings, or so far sanctioned such a departure in a lower Court as to call for the exercise of this Court's power of supervision.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

(1) The Circuit Court of Appeals for the Fourth Circuit has erred in affirming the judgment and decisions of the District Court and in overruling petitioners' pleas in abatement and motions to dismiss respondent's motion for judgment on the ground of want of jurisdiction under Title 28, USCA, Section 721, in that the notice of motion for judgment was a *process* of the District Court, and was not under the seal of the Court, signed by the clerk, and did not bear the teste of the District Judge, as was provided it should by that Statute, and has thus rendered a decision in conflict with the Statute and the applicable decisions of this Court.

(2) The Circuit Court of Appeals for the Fourth Circuit has erred and misconstrued and misapplied the Federal Statute, Title 12, Sections 63 and 64, in holding that the liability of your petitioners as shareholders was for the payment of the whole amount of the assessment alleged to have been made by the Comptroller of the Currency on the 230 shares of stock of the insolvent National Bank of Louisa, Virginia, and was "contractual" and "joint" and was not *statutory*, and was not imposed by virtue of the above statute and was not limited to the amount *individually invested by each of your petitioners* in such shares, or solely "to the *extent of the amount of his stock therein*, at the par value thereof, in addition to the amount *invested* in such shares" by each of them, but made each liable one for the other, and in this case for *ten times more than each petitioner had invested in such*

shares (R. 35, 36, 37, 38, 39, 42, 46, 47, 48-49, 50, 51, 54, 55). This important question of construction of the Federal Statute thus raised should be settled by this Court.

(3) The Circuit Court of Appeals for the Fourth Circuit in its construction of Title 12, USCA, Sections 63 and 64, has rendered a decision in conflict with the Statute and the applicable decisions of this Court by resorting to the expedient fo holding that "which each (of defendants) had one-eleventh interest in the enterprise" (Opinion, R. 74), yet the liability of the five petitioners was nevertheless *joint* for the payment of the whole assessment on the 220 shares of stock of the alleged insolvent First National Bank of Louisa, Virginia, and was not one of "*individual* liability" limited to the "*extent of his investment in the shares, at par value*, in addition to the amount *invested* in such stock" by each of your petitioners as a shareholder, but that each of them was liable for the whole, "one for another"; namely, for ten times more than the amount each of them had "invested in such shares; namely, one-eleventh interest *only*, which the Circuit Court of Appeals for the Fourth Circuit found each defendant had (R. 74).

(4) Because the Circuit Court of Appeals has decided an important question of statutory federal law in a way probably untenable and in conflict with the weight of authority, and contrary to the statute itself.

(5) Because he Circuit Court of Appeals has erred in not reversing the decision of the District Court and in holding that while the liability for the payment of the double assessment was *joint*, yet that U. M. Gentry's Administrator, one of the defendants, was nevertheless not a neecssary party, and in discontinuing the action as to him, and entering a joint

judgment against your five petitioners for the whole amount of the double assessment of $22,000.00 made on the entire 220 shares. This question was not one of mere procedure, but involved a consideration of the *liability* on which respondent had declared, the evidence as to the amount each of the petitioners had invested in the shares, and the construction of Title 12, USCA, Sections 63 and 64.

(6) The Circuit Court of Appeals for the Fourth Circuit has erred in affirming the judgment of the District Court finding and holding that while each of your petitioners "had only a one-eleventh interest in the enterprise" (R. 74), *i. e.*, the 220 shares of stock on which the assessment was made, yet that each of them was nevertheless liable for the payment of the whole assessment on the entire 220 shares. It has thus decided the question of your petitioners' liability for the payment of such assessment in a way which is untenable, contrary to the overwhelming weight of the evidence, contrary to the weight of authority, and in conflict with the applicable decisions of this Court, and has misconstrued and misapplied Title 12, USCA, Sections 63 and 64, which expressly limit the individual liability of each of the petitioners for the payment of the assessment to the *extent* only of his investment in the shares of such bank, and not for ten more than each had invested in the shares. For these reasons the decision and judgment of the Circuit Court of Appeals calls for the exercise by this Court of its power of supervision.

(7) Because the Circuit Court of Appeals has erred in affirming the judgment of the District Court and in holding that while "it is clear that each had a one-eleventh interest in the enterprise" (R. 74), yet the liability of your petitioners for payment of the entire assessment made on the whole 220 shares was nevertheless joint, and that each was liable for

the entire amount thereof; and in so doing it has misconstrued Title 12, USCA, Sections 63 and 64, and has likewise misunderstood and misapplied the evidence, and failed to give effect to it, and disregarded the fact that the District Court during the trial held that each merely had an undivided one-eleventh interest in the entire block (R. 61) of the 220 shares, and that the subscription for the shares was "one agreement" and the making of the joint promissory note to the American Bank and Trust Company to borrow the money for each to pay for his stock was "another agreement" (R. 34). The Circuit Court of Appeals has thus erroneously disregarded the evidence and refused to follow this specific finding of fact made by the District Court, and has misconstrued and misapplied the Federal Statutes, Title 12, USCA, Sections 63 and 64, in its application to the evidence and has erroneously directed a verdict for respondent contrary to the law and evidence. These questions thus raised by the decision of the Circuit Court of Appeals call for the exercise of this Court's power of supervision.

Wherefore, your Petitioners respectfully pray that a writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals of the United States for the Fourth Circuit commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. ....., L. P. Chisholm, Waller Holladay, W. Earl Crank, T. S. Winston, and W. R. Dunkum, Petitioners, *versus* W. B. Gilmer, Receiver for the First National Bank of Louisa, Louisa, Virginia, Respondent, and that the final judgment of the Circuit Court of Appeals herein complained of may be reviewed and reversed by this Honorable Court, and that your petitioners

may have such other and further relief in the premises as to this Honorable Court may say meet and just; and your petitioners will ever pray.

Respectfully submitted this March ...., 1936.

L. P. CHISHOLM,
WALLER HOLLADAY,
W. EARL CRANK,
T. S. WINSTON,
W. R. DUNKUM.

MINITREE JONES FULTON and
HERMAN W. WALSH,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

TERM 1936

No. .....

L. P. CHISHOLM, WALLER HOLLADAY, W. EARL CRANK, T. S. WINSTON AND W. R. DUNKUM, Petitioners,

versus

W. B. GILMER, RECEIVER FOR THE FIRST NATIONAL BANK OF LOUISA, LOUISA, VIRGINIA, Respondent.

BRIEF FOR PETITIONERS IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

THE OPINIONS OF THE COURTS BELOW

The opinion of the Circuit Court of Appeals is not yet reported in Federal Reporter but is set out in the record at pages 71 to 79. The opinion of the District Court is not reported but is set out in the record at pages 57 to 62.

JURISDICTION

(1) The final judgment of the Circuit Court of Appeals sought to be reviewed was entered on January 7, 1936 (R. 79), and affirmed the judgment of the District Court of July 2, 1935, for $22,000.00 against petitioners (R. 25-26).

(2) The suit was attempted to be instituted in the United States District Court by a notice of motion for judgment issued by respondent and signed by him. It was not under the seal of the Court, nor signed by the clerk, and did not bear the teste of the District Judge as required by the Federal Statute. It was issued solely by the Receiver of the alleged insolvent First National Bank of Louisa, Virginia, against petitioners as alleged shareholders therein to recover an assessment alleged to have been made by the Comptroller of the Currency on the shares of stock of said insolvent bank under and by virtue of authority of Federal Statute, Title 12, USCA, Sections 63 and 64, and involved an amount of more than $3,000.00 exclusive of interest and costs (R. 1-2).

(3) The jurisdiction of this Court is invoked under Section 240 of the Act of February 13, 1925, as amended. (Title 28, USCA, Section 347-A, Judicial Code 240.)

Some of the cases believed to sustain the jurisdiction are:

McLane v. *Rankin,* 197 U: S. 154, 49 Law, Ed. 702.
Pauley v. *State & Company,* 165 U. S. 606, 41 Law, Ed.

844.

Rankin v. *Fidelity & Company*, 189 U. S. 242, 47 Law, Ed. 792, Revised Statutes Section 51 U. S., Title 12, USCA 62, 63 and 64.

Earley v. *Richardson*, 280 U. S. 496, 50 S. Ct. 176, 74 Law, Ed. 575, 69 L. R. A. 658.

Ohio, etc., Bank v. *Hewlett*, 254 U. S., 51 Law, Ed. 423.

STATEMENT OF THE CASE

The facts and a full statement of the case in so far as this application is concerned have been given in the Petition for the Writ to which reference is here made, as to the subject matter of the suit, the issues presented in the notice of motion and pleadings, the judicial question presented, and the decision and final judgment of the Circuit Court of Appeals (R. 71-79). In the interest of brevity the statement is not repeated at this point.

SPECIFICATION OF ERRORS

The errors which petitioners will urge are that the Circuit Court of Appeals for the Fourth Circuit erred:

(1) In overruling petitioners' pleas in abatement, motions to dismiss the notice of motion and judgment and demurrers thereto and in affirming the judgment of the District Court and dismissing the appeal, has misconstrued and misapplied Title 28, USCA, Section 721, because under that statute a suit to recover money must be begun by a writ or process, and the notice of motion for judgment was a process within the meaning of that statute and was not under the seal of the Court, nor signed by the clerk, and did not bear teste of the District Judge, and the District Court was

without jurisdiction to entertain such proceeding, and the United States Marshal was likewise without authority to serve said notice of motion under the Federal Statute, Title 28, USCA, Section 50[illegible]. There was no valid service of a valid process on petitioners, and the judgment of the District Court was void for want of jurisdiction, and the decision of the Circuit Court of Appeals has thus misconstrued the above federal statutes and is in conflict with the decisions of other Circuit Courts of Appeal and has created a conflict in such decisions on this important substantive matter of federal law which should be settled by this Court.

(2) In proceeding to trial and judgment against the five petitioners and each of them (R. 26) for $22,000.00, the entire amount of the double assessment on the 220 shares of stock, without the presence of the Administrator of U. M. Gentry, one of the defendants who was alleged to be *jointly* liable with petitioners in the notice of motion for the payment of the double assessment, and in not trying the case as to him along with the petitioners. This was in effect a discontinuance of the joint action as to him (R. 1-2), while holding that he and "each had a one-eleventh interest in the block" (R. 74), yet nevertheless the plaintiff had the right to proceed to judgment for the whole amount against petitioner a part of the defendants solely liable for the subscription under Section 6025 of the Code of Virginia 1900, without proceeding against the other joint defendants (R. 72-73). The Circuit Court of Appeals has thus erroneously decided under a statute not applicable an important question of substantive federal law in a way probably untenable and in conflict with the Federal Statutes and Title 12, Sections 63 and 64, and the weight of authority and the applicable decisions of this Court and of the other United States Circuit Courts of Appeal. The question was not one of mere procedure un-

der or controlled by Section 6047 of the Virginia Statute relating to when a joint or several judgments may be instituted in the United States Court, but was one where Congress had legislated the above Title 28, Section 721, and of federal substantive law, Title 12, USCA, Sections 63 and 64, which expressly provides:

> "The shareholders of every National Banking Association *shall* be held *individually* responsible, equally and ratably, and not one for another, but each to the amount of his stock therein at par value in addition to the amount invested in such stock."

Neither a joint or several judgments could be entered against the five petitioners under this Federal statute for a greater amount than "one-eleventh interest' which both the District Court (R. 61) and the Circuit Court of Appeals (R. 74) found that Gentry's Administrator and each of the other deefndants had in the 220 shares of stock registered and held by J. P. Donally, Trustee for L. P. Chisholm and others.

(3) In admitting evidence, over the objection of petitioners, as to the execution by them along with the other six defendants of a note for $36,450.00 given to the American Bank and Trust Company to borrow money for each to pay his one-eleventh part of the purchase price each had agreed to invest and as to the judgment thereon by the Receiver of said Bank, and in admitting any evidence relating thereto, as specifically pointed out in Assignments of Error numbered (4), (5), (6), (7), (8) and (9), set out in the Record at pages 27 and 28.

(4) In rendering a decision affirming the judgment of the District Court holding that the *liability* of petitioners for the payment of the whole amount of the alleged assess-

ment upon the 220 shares of stock of the insolvent National Bank of Louisa, Virginia, was "joint" and "contractual," (Op. R. 72) and that such liability was not statutory under Title 12 USCA, Sections 63 and 64, and was *not* limited to the "*extent* of the amount invested" by each of petitioners as shareholders therein

(5) The Circuit Court of Appeals for the Fourth Circuit has also misconstrued and misapplied Title 12, USCA, Sections 63 and 64, under which petitioners as shareholders of the First National Bank of Louisa were made *individually* and severally responsible *only* to the extent of the amount each invested in the shares of stock agreed to be bought by them, and in holding that "while each had a one-eleventh interest in the enterprise" (Op. R. 74) that each of the petitioners was nevertheless *jointly liable* for the payment of the *whole* amount of the alleged assessment on the entire 220 shares of stock. Such finding was contrary to the uncontradicted evidence, to the several agreements of purchase, and was in violation of and misconstrued and misapplied the above sections of the Federal statute, which made each of them individually liable for the assessment only to the "extent each had invested in such shares." The construction of this important Federal question should be reviewed and finally settled by this Court.

(6) In overruling petitioners' motion made at the conclusion of the plaintiff's evidence for a directed verdict in their favor, and in likewise overruling petitioners' same motion renewed at the conclusion of all the evidence to direct a verdict in their favor (R. 57) and in not holding that a judgment could only be entered against each of them for the assessment on the one-eleventh of the 220 shares which both the District and the Circuit Courts of Appeals found (Op. 61, 74) each owned or had in the 220 shares of such National Bank stock both under their contracts of subscription and

under Title 12, USCA, Sections 63 and 64, and yet nevertheless erroneously held that each of the five petitioners were jointly and severally liable for the payment of the whole amount of the double assessment made on the entire 220 shares. This joint liability was not proved and was not a fact.

(7) In sustaining the respondent's motions to direct a verdict in his favor made *after* the Court had announced that it would overrule petitioners' motions for a directed verdict (R. 58) and in refusing to submit the case to the jury under proper instructions on the law and evidence in respect to what their respective agreements to purchase was and as to the amount each invested in the shares of stock, and as to the extent of their ownership of each in the 220 shares, and as to the alleged liability of each of the petitioners as to the payment of the whole or only one-eleventh of the assessment made on the 220 shares of stock made by the Comptroller of the Currency and deciding such liability contrary to both the evidence and law. (R. 35, 36, 37, 38, 39, 42, 46, 47, 48, 50, 51, 54, 55).

(8) In overruling petitioners' motion to set aside the verdict and award a new trial to petitioners and in holding that "while each of petitioners had only a one-eleventh interest in the entire enterprise" (R. 74), yet as a matter of law each of the five petitioners was nevertheless liable for the payment of the *whole assessment of* $22,000.00 made on the entire 220 shares of the stock of such bank. Such holding was contrary to the statute, Title 12, USCA, Sections 63 and 64, and to the evidence.

ARGUMENT

I

The Federal Courts have repeatedly held that a notice

of motion issued an dsigned solely by a plaintiff for the purpose of instituting an action at law in a District Court of the United States, *was a process* within the meaning of Revised Statutes of the United States, Section 911 (Title 28, USCA, Section 721), and to be valid it had to be under the seal of the District Court, signed by the clerk, and bear the teste of the District Judge.

The action in the instant case was begun by a notice of motion for a personal judgment for money. It was *not* under the seal of the District Court, nor signed by the clerk, and did not bear teste of the District Judge. (R. 1-2). The District Court was without jurisdiction to entertain such action under Title 28, USCA, Section 721, and the United States Marshal was likewise without authority to *serve* such notice of motion under Title 28, USCA, Section 503. The District Court never acquired jurisdiction at all of the suit because there was no valid service of a valid process or valid service. The decision of the Circuit Court of Appeals affirming such judgment is erroneous and in disregard and in violation of such statutes and in conflict with the decisions of other Circuit Courts of Appeal and and the weight of authority and has created a conflict in the Federal decisions on this important matter of Federal law, and involves a Federal question under the laws of the United States.

The whole proceeding was contrary to Title 28, USCA, Section 721, which provides:

> "*All writs and processes* issuing from the Courts of the United States shall be under seal of the Court from which they issue, and shall be signed by the clerk thereof."

In Rose's Code, Volumn 1, Section 901, the author states:

"Federal Courts derive their power to issue the common-law writs from *R. S., Section* 911. The *form* and general style of *Federal writs are also prescribed by Congress. So that the conformity requirement of R. S. Section* 914 *has little or no application to Federal writs.* The conformity law applies, however, to process in common-law causes, *except as regards form and style, which Congress has prescribed, and as respects service, it being provided that Federal process shall be served by the marshall.* These requirements as to form and service forbid adoption in the Federal Courts of the New York and Wisconsin practice in so far as it permits plaintiffs' attorney to issue and serve the summons."

The decision of the Circuit Court of Appeals is also in direct conflict with *Peaslee* v. *Haberstro*, Fed. Cas. No. 10, 884, where the Court held:

"*The motion to set aside the summons must be granted upon the ground that the summons was not signed by the clerk or under the seal of the court.* Section 911 of R. S. of U. S. prescribes that '*all writs and processes issuing from the Courts of the United States shall be under seal of the Court from which they issue and shall be signed by teh clerk thereof.*' This provision is not inconsistent with and, therefore, *is not repealed* by the subsequent Act of Congress (Act of June 1, 1872, Section 5, 17 Stat. 197) now embodied in Section 914 of R. S. which enacts that 'the practice, etc. * * *' (Conformity Act). Giving due effect to the latter act, the practice and forms and mode of proceeding in Courts of the United States in common law actions is to conform to and be regulated by that of the State Courts *when there is no statute of the United States prescribing different practice or forms or modes of procedure. When the statutes of the United States are silent*, the practice of the State Courts will prevail, *but when those statutes speak they are controlling.* If the *summons* in this case had been

signed by the clerk, it could be amended as regards the seal. *As it is there is no summons in the nature of process known to this Court. The summons is set aside.*"

So for the same reasons the summons issued by and signed by the plaintiff in the instant case should have been set aside.

In *Dwight* v. *Merrit* (Cir. Ct. S. D. N. Y.), 4 Fed. 614, a motion to set aside a *summons* under New York practice, Blatchford, Circuit Judge, said:

> "In this case an *attempt* has been made to *commence a suit at common law in this Court by serving on the defendant a paper purporting to a summons in the form presented by the statute of New York for commencing a civil action. It is signed by the plaintiffs' attorney*, but is *not under seal of the Court. * * * A summons, or notice to the defendant for the commencement of a suit is certainly process, quite as much as a capias or a subpoena to appear and answer is process. The statute intends that all process shall issue from the Court, where such process is to be held to be the action of the Court, and that the evidence that it issues from the Court* and is the action of the Court *shall be the seal of the Court and the signature of the clerk.* It is *clear that a signature by the plaintiffs' attorney without a seal and an issuing from the office of such attorney cannot be substituted.* There is nothing in the provisions of Section 914 which abrogates the provisions of Section 911. The two must be so construed as to stand together. *Peaslee* v. *Haberstro*, 15 Blatch. 472. The principle of that decision has been generally adopted in applying Section 914 to the practice of the Federal Courts in suits at common law. *That principle is that where Congress has by statute pointed out a specific course of procedure, or has legislated*, generally upon the subject matter embraced or involved by the proceedings sought to be pursued, *such legislation must be followed, although opposed to the forms and*

modes of proceeding prevailing in the state Courts and established by state statutes. Defect not amendable."

In *Johnson* v. *Healy*, Fed. Cas. at page 7389, it was also said:

"In the case of *Martin* v. *Criscuola*, Cas. No. 9159, it was held that a summons not issued by a Court, but merely issued by the plaintiffs' attorney, *was not a proper summons*. That decision, on the view that the summons is process and must, under the statutes of the United States, and notwithstanding the provisions of the Act of 1872 and of Section 914 of R. S., *be issued by the Court* and have the authentication of the Court."

In *U. S.* v. *Martin*, 223 Fed. 805 (E. D. N. Y.), the Court, distinguishing between form of process and manner of service, said:

"*Federal legislation must, of course, be followed, although opposed* to the practice and procedure of the state Courts. U. S. Rev. St. Section 911 (Comp. St. 1913, Section 1534). Accordingly it has been held that an *action may not be commenced in the Federal Courts by a summons issued in the name of the plaintiff's attorney, pursuant to the mode of commencing actions in the Courts of the State of New York* *Martin* v. *Criscuola*, 10 Blatchf. 211, Fed. Cas. No. 9, 159; *Peaslee* v. *Haberstro*, 15 Blatchf. 472, Fed. Cas. No. 10, 884; *Dwight* v. *Merrit* (C. C.), 4 Fed. 614."

In *Middleton Paper Co.* v. *Rock River Paper Co.*, 19 Fed. 252, it was said:

"Under the state law in this state and in New York and some other states, the plaintiff's attorney issues the summons, which is the commencement of a suit, but I believe it has been uniformly held, *in view of the pro-*

*visions of Congress, that this cannot be done in the Federal Courts * * * .*"

In re Condemnation Suits, 234 Fed. 443 (E. D. Tenn.) Sanford, Jude, said:

"I think it *entirely clear,* both upon principle and under the authorities, that in any original suit in a Federal Court which must be commenced by a summons or other process of the Court itself, *such process must be signed by the clerk and issued under seal of the Court* to be valid, *regardless of any different provision* as to the form of a summons *in the state Courts, the general conformity statutes not operating to waive this specific requirement as to the process in the Federal Courts* embodied in Section 911 of the Rev. Statutes. (Citing cases.)"

In *Cooper* v. *Reynolds,* 10 Wall. 308, 19 L. Ed. 931, 932, Mr. Justice Miller, delivering the opinion of this Court, distinguished and determined the manner of exercise of different sorts of jurisdiction thus:

"*Jurisdiction of the person is obtained by the service of process,* or by the voluntary appearance of the party in the process of the cause.

"Jurisdiction of the *res* is obtained by a seizure under process of the Court, whereby it is held to abide such order as the Court may make concerning it."

In *Boswell* v. *Otis,* 9 How. 336, 13 L. Ed. 164, 169, this Court again said:

"*Jurisdiction is acquired in one of two modes:* First, *as against the person of the defendant by the service of process;* or, secondly, by a procedure against the property of the defendant within the jurisdiction of the Court."

Jurisdiction was not acquired in either of the two modes in the instant case.

In *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565, 570, this Court again distinguished the use of substituted service by notice *in a rem proceeding from process which is required to give jurisdiction against the person.*

In the case at bar the District Court was called upon to exercise a jurisdiction "against the person," and under the above Federal Statute and decisions, jurisdiction could *only* be acquired by a process issued by the District Court, signed by the clerk, and bearing the teste of the Judge. (USCA, Title 28, Section 721). "Lex ita est." Where Congress has specified a procedure it must be followed.

NOTICE OF MOTION IS PROCESS

The Circuit Court of Appeals held that the notice of motion for judgment in the instant case was under the Virginia statute a proper method of proceedure to obtain a personal money judgment against petitioners in the United States District Court. (R. 72).

This holding is indirect conflict with Title 28, USCA, Sections 721 and 508, and with the decisions of other Circuit Courts of Appeal, and the weight of authority pointed out supra. This conflict in the Federal decision should be settled by this Court.

Besides Hughes Fed. Proc. 2nd Ed., Section 137, referring to Title 28, USCA, Section 721, says:

> *"This excludes procedure by motion to recover money common in some states when the notice is simply signed by the attorneys. * * * A motion to recover money*, when authorized by state practice, can be used in the Federal Courts; *but in such case the notice of motion * * * must be signed, not by the attorneys, but by the clerk, and must be under the seal of the Court."*

Hughes in his 6th Edition, Section 3584, again says:

> "In *general the forms* of such process that obtain in the State courts are adopted in the Federal Courts, *except that there can be no departure from the Federal statutory requirement as to the sealing, signing and testes of writs and processes.*"

The notice of motion in the case at bar departed from these Federal statutory requirements, and was not a valid service of a valid process, and the judgment, was void for want of jurisdiction, and the Circuit Court of Appeals for the Fourth Circuit erred in not so holding.

Moreover, the Supreme Court of Appeals of Virginia in *Hot Springs Co.* v. *Schreck*, 131 Va. 581, 584, referring to the proceeding of Notice of Motion in the State Courts said:

> "We have held in a number of cases that the notice under Section 6046, *takes the place of the writ and declaration. Morotock Ins. Co.* v. *Pankey*, 91 Va. 259, 21 S. E. 487; *Security Loan Co.* v. *Fields*, 110 Va. 827, 67 S. E. 342, and cases cited.

This holding by the highest Court of the States as to the notice of motion taking the place of the writ and declaration . . . a process under the Virginia statute—should have been regarded as binding upon the United States District Court and the Circuit Court of Appeals in the instant case, and the notice of motion, is, therefore, clearly within Section 911, R. S., which declares that the exercise of the judicial power of the United States *shall be by a paper signed*, and authenticated by its officers. The decision of the Circuit Court of Appeals for the Fourth Circuit in the instant case, as well as its former decision in *Ely* v. *Gamble*, 75 Fed. (2nd) 171, is erroneous and in conflict with the decisions of other Circuit Courts of Appeal on the same matter and involves a

Federal question, and is untenable, and in conflict with the great weight of authority, and with the U. S. revised statute, Section 911. These important Federal questions should be settled by this Court.

II

Moreover, the only provision in the Federal law for *service* of *process in a "personal action to recover* a money judgment" in the United States Courts is Section 503, Title 28, U. S. Code. It provides:

> "It shall be the duty of the marshal of each district to attend to the District Courts when sitting therein, and to execute, throughout the District, all lawful process *directed to him*, and issued under the authority of the United States. (R. S. Section 787.)"

The United States Marshal, therefore, had no authority to serve the Notice of Motion in the instant case under Section 503, Title 28, USCA, *supra*, and the final judgment and decision of the District Court in the instant case was a nullity and void for entire want of jurisdiction to entertain such action.

III

The Circuit Court of Appeals for the Fourth Circuit has erred in affirming the judgment of the District Court against petitioners, five of the defendants, and in continuing the case as to U. M. Gentry's Administrator, one of the other defendants who had not taken bankruptcy, and who was alleged to have been jointly liable with petitioners for the payment of the entire double assessment on the 220 shares of stock of the insolvent National Bank (Op. R. 72-73).

First, this holding increased the individual responsibility of petitioners as shareholders from one-eleventh to eleventh-elevenths, or ten times more than the amount *invested* in the shares by each of the petitioners; secondly, denied each of them the right of contribution against the alleged joint defendant, Gentry's Administrator; thirdly, if not reversed, this holding will compel petitioners to pay the whole double assessment on the entire block of 220 shares, although the District Court and the Circuit Court of Appeals both found each of them had only one-eleventh part in the entire block of 220 shares. This made each petitioner liable for the other defendants, and not each "individually responsible, equally and ratably," and made petitioners liable for payment of the assessment made on the shares owned by U. M. Gentry's Administrator, as well as on the shares owned by the other six defendants who had taken bankruptcy prior to the trial; fourthly, compelled petitioners to try plaintiff's claim against the alleged joint defendant, Gentry's Administrator, both as to his alleged joint and several liability and as to his claimed insanity, and changed petitioners from defendants to plaintiffs.

This was erroneous and contrary to the individual liability imposed on petitioners by virtue of Title 12, USCA, Sections 63 and 64, and was not one of mere procedure under the Virginia Code of 1930, Sections 6047 and 6225, as was erroneously held by the Circuit Court of Appeals. (Op. R. 72-73), but was one of statutory liability imposed on each by the Federal Statute.

The District Court (R. 61) found from the evidence that each of the defendants merely had "an undivided one-eleventh interest in the entire block which was kept in the block under the control of the trustee for certain purposes," and the Circuit Court of Appeals likewise found, (R. 74), ". . . . it is clear that while each had one-eleventh interest in the inter-

price, * * * yet it nevertheless erroneously held, that the liability for payment of the double assessment was for the whole amount of the entire 220 shares, and not for one-eleventh of it.

This materially changed the substance of the alleged case, as to which the parties directed their proof, and misconstrued and misapplied, and nullified Sections 63 and 64, Title 12, USCA.

The Circuit Court of Appeals (Op. R. 72) cited the cases of *Richmond* v. *Irons*, 121 U. S. 27, 55; *Mattesson* v. *Dent*, 176 U. S. 521, 525 as authority for its holding in the instant case. Those cases do not sustain it.

First, because the bill of complainant in *Richmond* v. *Irons* shows that the suit there was "for an account of the amount for *each* of the said defendants upon the number of shares of stock held by them at the time said bank suspended" (30 L. Ed. 867).

No question of joint liability was involved in that case. Moreover, this Court in that case, at page 871, said:

> "By the original National Banking Act, Section 5151 of the Revised Statutes, it was declared that "The shareholders of every national banking association shall be held *individually* responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, *to the extent of the amount of their stock therein*, at the par value thereof, *in addition to the amount invested in such shares.*"
> * * *
> "As all the shareholders are bound in that way * * * any proceding to enforce this liability must be such as from its nature would enable the court to ascertain for

what the stockholders ought to be made liable, to whom, and in what proportion as respects each other."

It is thus obvious that the decision of this Court in *Richmond* v. *Irons* does not sustain or authorize the holding of the Circuit Court of Appeals in the instant case.

Nor does the decision of this Court in *Matteson* v. *Dent* sustain the erroneous holding of the Circuit Court of Appeals, to the effect that the respondent, receiver, might proceed to judgment against the petitioners, five of the defendants, for the whole amount of the assessment made on the block of 220 shares, under and by virtue of Sections 6047 and 6225 of the Code of Virginia, 1930, without proceeding against the other alleged defendants.

In that case the action was by the Receiver of the insolvent National Bank to recover from the allotees of the deceased, Matteson, an assessment on stock owned by him in his life time and registered in his name on the books of the bank at the time of his death. After his death the decedant's estate, including the shares of stock, was turned over, one-third to his widow and one-ninth to each of his children as the allottees of his estate. The National Bank failed and the comptroller made an assessment "upon each share and proceeded to enforce the assessment. The receiver sued in the State Court of Minnesota, the widow and children of Matteson, asking judgment against them for the amount of the said assessment.

This Court held:

"The suit was in conformity to the general Statute of 1894 of Minnesota which . . . permitted an action to be brought against *all* or one or more of the

next of kin of the deceased person, by the creditor of an estate, to recover the distributives shares received out of such estate or so much thereof as might be necessary to satisfy the debt of the intestate." (176 U. S. at 523, 44 L. Ed. 571).

IV

RESPONSIBILITY OF SHAREHOLDERS INDIVIDUAL AND STATUTORY—NOT CONTRACTUAL OR JOINT

The Circuit Court of Appeals (R. 73) next erroneously held:

The Circuit Court of Appeals (R. 73) next erroneously held:

"Coming to the *merits* of the case we note at the conclusion of the testimony both sides moved for a direct verdict." It is well settled that this amounts to a waiver of jury trial and a consent that the Trial Judge decide the issues and direct the verdict accordingly * * *. In other words, the verdict must stand unless the party against whom it was directed was entitled to have it directed in his favor," and cited *Williams* v. *Vreeland*, 250 U. S. 295, and other cases, as sustaining this holding.

These cases do not sustain the holding in the instant case. First, because in the case of *Williams* v. *Vreeland* this Court said:

> "Each side asked for a directed verdict without more."

In that case the motion was made by both sides for a

directed verdict at the same time. In the instant case the motions for a directed verdict were *not* made at the same time (R. 46, 57-58), and there was "more."

Second, petitioners at the conclusion of plaintiffs' evidence first moved for a directed verdict in their favor (R. 46). This motion was overruled (R. 46, 28). The evidence then showed that the petitioners were *not* jointly liable, nor were they individually or jointly responsible for the whole assessment made on the 220 shares of stock. They were, therefore, entitled to have a verdict directed in their favor, since the action was *joint* and the holding of the District and Circuit Court of Appeal was contrary to both the facts and law.

The grounds of petitioner's motion for a directed verdict in their favor first made at the conclusion of respondent's evidence and later renewed at the conclusion of all the evidence, were in effect that the evidence showed that petitioners and other defendants were each owners of only one-eleventh interest as mere tenants in common in the block of 220 shares registered on the books of the bank and held in the name of J. P. Donnally, Trustee for L. P. Chisholm and others, and nothing had been shown to create a liability against petitioners for the whole amount jointly or *individually* for their respective interest in the stock in question, and no special combination or joint adventure or limited partnership for profit had been proven (R. 46).

The allegation of the notice of motion was *joint*, and alleged that the five petitioners and the six other defendants were *jointly* and severally liable for the payment of the whole double assessment made on the entire block of 220 shares of stock of the insolvent national bank registered and

standing on the bank's books in the name of J. P. Donnally, Trustee for L. P. Chisholm and others. The bank books did not disclose the name of any of the defendants or for whom Donnally was trustee except L. P. Chisholm, and did not show or discolse the number of shares owned by each of them or the amount invested by each of them in the stock or the extent of their respective investment therein.

The evidence showed that each petitioner owned only one-eleventh interest in the block of 220 shares held by Donnally, trustee; that each had purchased one-eleventh part thereof and that that was the extent of the investment made by each in such stock when they each agreed to take it (R. 36, 37, 38, 42, 47, 49, 50, 51, 54-55, 58).

There was, therefore, a variance between the respondent's allegations and proof, and Title 12, USCA, Section 64, expressly declared, "That the sharehoulders of every national bank shall be held individually responsible equally and ratably therein * * * in addition to the amount invested in such stock."

And the District Court (R. 61) and the Circuit Court of Appeals (R. 74) both found from the evidence that each of the defendants *only* "had one-eleventh of the block of 220 shares of stock standing in the name and held by Donnally, Trustee."

The action of the Circuit Court of Appeals affirming the ruling of the District Court in overruling petitioners' above motion for a directed verdict in their favor was, therefore, clearly contrary to both the facts and law and was erroneous, since petitioners were entitled to have their respective motions for a directed verdict in their favor granted, both under both the evidence and law.

Thirdly, at the conclusion of all the evidence, petitioners renewed their above motion for a directed verdict in their favor (R. 57), and respondent then likewise moved for a directed verdict in his favor, but being told by the District Court:

"That the effect generally when each side moves for a directed verdict is, it takes the case away from the jury," respondent said:

"I am going to withdraw our motion for the time being and take it up on the charge" (R. 57), and oppose the granting of petitioners' motion for a directed verdict in their favor (R. 58).

Respondents thereby admitted that the evidence was sufficient to carry the case to the jury for its decision, and that it was not to be decided by the trial Court as a matter of law.

Thereupon, petitioners' motion for a directed verdict was argued, and the trial Court (R. top of 58) said:

> "I don't have any doubt about my duty to overrule this motion. The question in my mind is whether I should submit the case to the jury at all or not."

Respondent thereupon said:

> "Our view is that it should not be submitted to the jury."

The Court then said:

> "I haven't heard any motion to that effect."

Respondent then said:

"We make it right now" (R. 68).

It is thus obvious from the record that the trial Court had announced that it overruled petitioners' motion for a directed verdict in their favor *before* respondent made its motion for a directed verdict, and that both sides did not move for a directed verdict at the same time, and that the effect of respondent's motion for a directed verdict in his favor made *after* the trial Court had overruled both of the petitioner's motions for a directed verdict in their favor, *was not to take the case from the jury and make it solely one for the decision of the Court as a matter of law on the evidence in the instant case.*

Fourth, it is likewise obvious from the evidence that the Circuit Court of Appeals erred in affirming the judgment of the District Court in overruling petitioners' motions for a directed verdict, first made at the conclusion of respondent's evidence (R. 46) and later at the conclusion of all the evidence (R. 57).

On this point the records shows that respondent, in whose favor the trial Court directed a verdict was not entitled on the evidence and law in this case to have the trial Court as a matter of law to direct a verdict in his favor, since there was substantial, preponderating and overwhelming evidence in favor of petitioners against whom the verdict was directed.

L. P. Chisholm, one of the defendants, testified:
"We agreed to take one-eleventh of that stock."

Perkins, another of the deefndants, testified (R. 39).

He agreed to try to pay one-eleventh instead of going on the big note, didn't want to go on any of it; was ready and willing to pay his one-eleventh; didn't mind owning one-eleventh at that time. * * *

P. B. Porter testified (R. 46):

Each was to taken one-eleventh part; each was to pay for one-eleventh share at the rate of $150 for each share of stock they took, each was to get 21 or 22 shares or something like that; that was the understanding he had with each of the others.

Id. (R. 47).

Q. What interest did you have in the 220 shares?

A. As I said formerly, sir, my interest was one-eleventh, that is what I considered.

Walter Holladay, another of deefndants, said (R. 49): "* * * each director bought one-eleventh interest.'

Earl Crank testified (R. 51):

" * * * that each agreed to take his eleventh part, one-eleventh of whatever number was unsold at that time."

Worth Smith, another defendant, testified (R. 53):

"* * * he assumed he was buying in accordance with the first meeting, namely, one-eleventh."

W. R. Duncan testified (R. 54):

"* * * when the question of selling the stock came up he proposed to buy one-eleventh as he understood it, *and did buy one-eleventh* of the amount that was issued, 220 shares or something like that that had not been sold to others."

Thomas S. Winston, another defendant, testified (R. 53):

"It was his agreement he was to take one-eleventh of the stock."

J. D. Donnally, Cashier, another defendant who was also Trustee, testified (R. 56):

"He purchased one-eleventh of the block of stock, whatever that might be, 250 shares or less."

None of the other defendants or parties to the agreement to purchase the stock testified, and the Receiver offered no evidence of any other person who was present and made the agreement of each to buy.

Donally, Trustee, further testified (R. 42-43):

"He said he in 1931 and 1932 filed in the Comptroller's Office a report of the stockholders of the bank, etc."

This list showed the shares of stock which each of the defendants had purchased was an undivided one-eleventh interest as shown by the evidence *supra,* and shows that the creditors of the bank as well as the Comptroller of the Currency knew and could have ascertained for whom J. P. Donnally was Trustee and the number of shares held by each, if the creditors and the Comptroller had made due inquiry.

This evidence is not conclusive that each of the petitioners only owned one-eleventh interest in the block of 220 shares, certainly was sufficient to show that respondent was not entitled to have a verdict rendered in his favor and to carry the case to the jury for a decision on this issue.

For on respondent's motion for a directed verdict in his favor the burden was on him to establish by *undisputed* evidence before a verdict could be directed in his favor.

On this point the record also shows that the District Court found that each of the five petitioners and the other six defendants "merely had an undivided one-eleventh interest in the entire block which was kept in a block under the control of a trustee" (R. 61). It also shows that the Circuit Court of Appeals itself found (R. 74) that the:

> "Several defendants took the stand and testified that each was to own one-eleventh of the stock purchased, but it is clear that, while each had a one-eleventh interest in the enterprise, the stock was purchased as a result of the joint action of all; that it was paid for with the profits of a note that they executed jointly; that it was held in trust and for joint use and benefit; that they shared in the losses sustained as a result of the purchase; that the dividends received were applied for their joint benefit; that each had an equal voice in the manageemnt of the enterprise, and that they would have shared equally in the profits, if profits had been realized."

*Here, the important fact is that each of the defendants purchased "and merely had an undivided one-eleventh interest in the entire block," and that it is clear that * * * "each had a one-eleventh interest in the enterprise."*

Title 12, USCA, Sections 63 and 64, made the shareholders "*individually* responsible, equally and ratably," and not one for another, and only "to the extent of the amount each had invested in the block of 220 shares." By this statute each defendant was made *individually* responsible only to the extent of the one-eleventh of his stock or interest in the 220 shares of stock on which the assessment was made.

The mere fact that each bought one-eleventh of the shares at the same time and that this was the result of the joint

action of all, that it was paid for out of the proceeds of a note that was executed jointly to the American National Bank to enable each to raise his part of the cash to pay for his one-eleventh part of the shares, and each shared to the extent of one-eleventh part of any losses sustained, and that the dividends received from the Bank of Louisa on the shares of stock purchased by each of them were directed to be applied by the trustees to pay the interest on the note given by them to the American National Bank, and that each had an equal voice in the handling of the stock purchased by them from the Bank of Louisa, and shared equally in the profits, if any had been realized, *did not either as a matter of law or fact render each of the petitioners and other defendants responsible for the whole double assessment made on the entire block of 220 shares of stock, nor did it make each of them liable beyond the amount each invested in the block of stock, no matter how it was held or handled by the trustee for purposes of convenience of the several shareholders, as alleged in the notice of motion.*

The *fundamental fact is* that each agreed to purchase one-eleventh and to invest to that extent only in the entire shares to be issued by the bank, as the Courts seek to ascertain "for what each stockholder ought to be liable, to whom, and in what proportion as respects each other" (*Richmond* v. *Irons*, 30 L. Ed. 871).

This was the construction placed by this Court on this statute in *Pauly* v. *State Loan and Trust Company*, 165 U. S. 606, 17 S. Ct. 465, 41 L. Ed. 844, where, construing the above statute, it reviewed the earlier cases relating to the responsibility of the shareholders for a double assessment made on the shares of stock of an insolvnt national bank (R. 17 U. S. Ct.), said:

> "The *real* owner of the shares of capital stock of the National Bank Association is treated as the shareholder in the meaning of 5151 (Title 12, USCA, Section 63)."

In the recent case of *Early* v. *Richardson,* U. S. 496 at 499, 50 S. C. 176 at 177, 74 L. Ed. 575, 69 A. L. R. 658, this Court also said:

> "That the *actual* owner of the stock may be held for the assessment, although his name does not appear upon the transfer books of the bank, is well settled. *Ohio Valley National Bank* v. *Hulitt,* 204 U. S. 162, 167, 168, 27 S. Ct. 179, 51 L. Ed. 423; *Davis* v. *Stevens,* 17 Blatchf. 259, 7 Fed. Cas. 177, 178 (No. 3,653); *Case* v. *Small,* 10 F. 722, 724; *Houghton* v. *Hubbell,* 91 F. 453."

"Assent is necessary to become liable for a double assessment in a national bank," said this Court in *Keyser* v. *Hitz. Early* v. *Richardson,* 50 S. Ct. 177, and *Keyser* v. *Hitz,* 133 U. S. 138, 10 S.Ct.290 ,33L.Ed.531.

The Circuit Court of Appeals predicated its decision holding petitioners jointly and severally responsible for the whole double assessment, solely upon the state procedual statutes, sections 6047 and 6225, and upon the ground that the responsibility was *contractual.*

This holding is in direct conflict with Title 12, USCA, Sections 63 and 64, and the decision of this Court in *Christopher* v. *Norvell, Receiver of the First National Bank of Florida,* 201 U. S. 216, 26 S. Ct. 502, 50 L. Ed. 732 at 734, where this court said:

> "* * * and that a receiver of a national bank may, if necessary, to pay the debts of such an association enforce the individual liability of the stockholders." (Citing the Federal Statute.)

And at page 735 the Court further said:

> "In the event *she* became, by *force of the statute, individually responsible* to the amount of her stock at the par value thereof * * * Section 5151, which imposes such individual responsibility upon the shareholders of national banks, makes no exception in favor of married women."

And at page 736 said:

In *McClaine* v. *Rankin*, 197 U. S. 154, 161-163, 49 L. Ed. 702, 705-707, 26 Sup. Ct. Rep. 410, 412, 413, which was an action against a shareholder of a national bank to recover the amount due on an assessment made by the Comptroller of the Currency, *and in which the question was as to the nature of the cause of action,* this Court said:

> "Some statutes imposing individual liability are merely in affirmation of the common law, while others impose an individual liability other than that at common law. *If* 5151 *had provided that subscribing to stock or taking shares of stock amounted to a promise directly to every creditor, then that liability would have been a liability by contract. But the words of* 5151 do not mean that the stockholder promises the creditor as surety for the debts of the corporation, but *merely imposes a liability* on him as secondary to those debts, which debts remain distinct, and to which the stockholder is not a party. The liability is a consequence of the breach by the corporation of its contract to pay, and is collateral and *statutory*. * * * But here the right to sue did not obtain until the Comptroller of the Currency had acted, and his order was the basis of the suit. The statute of limitations did not commence to run until assessment made, and then it ran as against an action *to enforce the statutory liability, and not an action for breach of contract.*"

This Court thus held that Title 12, USCA, Sections 62-63, *created* the liability and made the shareholders *"individually responsible"* equally and ratably, and not one for another * * * to the extent of his stock therein.

To hold that the State laws could change the Federal Statutory liability from one imposed by the statute to a contractual liability and could change it from an individual to a joint liability, would be to allow the State law to defeat the policy of Congress expressly declared by Title 28, USCA, Sections 63 and 64, and by which the substantive rights of all shareholders and their individual responsibility is created and established by that act. *Laurent* v. *Anderson,* 70 Federal (2nd), 819 at 823.

The Circuit Court of Appeals in making its decision resorted to the expedient of holding "that although each of the petitioners only purchased and had one-eleventh of the block of 220 shares "and caused them to be held in the name of Donnally, Trustee, yet that nevertheless they were engaged in a joint enterprise" and that their responsibility was contractual (Op. R. 76). This holding was not only contrary to the Federal Statute which created the *individual* statutory liability, and to the decisions of this Court construing the same, but is obviously based upon a misapprehension of the facts and a misconstruction of the Federal Statute, and is entirely erroneous.

The fact that the directors of the bank as officers thereof, voted to increase the capital stock of the bank to the extent of 250 shares and then offered the stock to the old stockholders under their right to buy it, *did not create any joint* responsibility, or a joint adventure or a partnership on the part of petitioners in the purchase by each of a one-eleventh of the stock not taken by its existing stockholders, or sold to the public.

In voting to increase the capital stock the directors of this

bank acted just as all boards of directors of national banks act in similar circumstances. This did not create a partnership or joint adventure on the part of the petitioners and the other defendants.

Nor did the agreement of each of the defendants to purchase one-eleventh of the entire block of stock left after having first offered it for sale to the existing stockholders of the bank. Nor did the fact that each of them agreed that the one-eleventh purchased by him should be placed in the hands of a trustee and subsequently sold, or that each agreed to borrow the money to pay for his respective interest and to give a note to another bank from which they borrowed it. None of these extraneous acts changed the "individual responsibility" of each equally and ratably, and not one for another * * *, or the amount invested by each in his shares, did not change his *statutory "individual responsibility"* for any assessment thereafter made on the shares purchased by each *to a joint liability for the whole assessment made on the entire block of 220 shares held by J. P. Donnally, Trustee.* Both the District and Circuit Courts having found from the evidence that each of the petitioners and defendants had a one-eleventh interest in the entire block of 220 shares, the assessment subsequently made by the Comptroller of the Currency attached *only to the one-eleventh of the shares owned by each. This conclusion is inescapable.*

The fact that the purchase was or was not made as a means of strengthening the bank, in which all of the directors were interested, did not create a joint adventure or partnership.

V

The Circuit Court of Appeals next said (R. 77-78):

"And we think the same result follows if the relation-

ship of the defendants as joint adventures be ignored. Unquestionably they made a joint subscription for the stock through their trustee; and if the suit were on this joint subscription there would be no question as to the joint liability for the right subscription price," and cites Williston and certain cases from state courts.

These authorities did not involve the question of *individual responsibility* under the Federal Statute relating to the double assessments on the shares of insolvent national banks, Title 72, USCA, Sections 63 and 64, and have no applicability to the instant case.

This holding of the Circuit Court of Appeals is also contrary to the facts and the finding of the District Court (R. 61) where it found that each shareholder "merely had an undivided one-eleventh interest in the entire block which was kept in a block under the control of a trustee for certain purposes, all of which enured for the benefit of all." It was also contrary to the findings by the Circuit Court of Appeals (R. 74) that: "Several of the defendants took the stand and testified that each was to own one-eleventh of the stock purchased; but it is clear, that while *each had a one-eleventh interest in the enterprise*, the stock was purchased as the result of the joint action of all, etc."

It is submitted, in the light of the above findings from the evidence in the instant case, that the conclusion of the Circuit Court of Appeals that, "Unquestionably they (Petitioners) made a joint subscription for the stock through their trustee," is erroneous and in conflict with both the evidence and the Federal Statute, since each agreed for himself to take or purchase one-eleventh of the block of stock and to place his stock in the hands of J. P. Donnally, Trustee, for the "mere purposes of more conveniently handling it to

enable each to borrow the money to pay for it," etc. (R. 35, 39, 46, 49, 51, 53, 54, 56). No joint subscription of the stock was ever made by petitioners or any of defendants "through the Trustee, J. P. Donnally." He never subscribed for any of them, and no such claim was made in the trial Court or the Circuit Court of Appeals by respondent.

It is therefore submitted that the subscription was *not joint* and the responsibility for the double assessment *was purely statutory* and was imposed by the Comptroller of the Currency upon the shares of stock purchased and owned individually by each of petitioners and other defendants; and that the responsibility was not *"contractual,"* as was erroneously held by the Circuit Court of Appeals, but was an "individual responsibility, equally and ratably, and not one for another, * * * to the extent of the amount invested by each of the shareholders in his stock."

In *Pauly* v. *State*, 165 U. S. 606, 41 L. Ed. 844 at 850, this Court said:

> "And let it be observed that the liability upon shareholders is to the extent of the amount of their stock at the par value thereof in addition to the amount invested in such shares. The word '*invested*' plainly has reference to those who originally or by subsequent purchase became the real owners of the stock and cannot refer to those who never invested money in the shares, but only received the certificates of stock or, it may be, legal title thereto as collateral security for debts or obligations already or to be contracted. * * * If the certificates in question had been extended so as to give the name of the pledgor, it would not be supposed that upon any principle of justice or upon grounds of public policy, the pledgee could have been held to the liability imposed by U.S.R.S. 5151 upon shareholders. But the *liability being purely statutory*, the result ought not to be different

because of the circumstance that the name of the pledgor was omitted from the certificate," etc. * * *

It therefore follows that mere ownership does *not* involve in and of itself responsibility for the double assessment made on shares of stock under and by virtue of the terms of the statute, Title 12, USCA, Sections 63 and 64. To the contrary, each interest is distinct and separate. Each shareholder, whether the shares of stock are held in his own name or that of a trustee, is an aliquot owner and is responsible as the actual beneficial owner for the assessment made on the shares only in respect and to the extent of *his* interest, that is only on the number of shares owned individually by him. But he is not responsible for assessment on the shares owned by others, whether the entire stock be held by a trustee or otherwise.

It is submitted that the writ of Certiorari should be granted.

Respectfully submitted,

MINITREE JONES FULTON,
HOMAN W. WALSH,

Dated March 14, 1936.

APPENDIX

Code of 1930 Virginia, Sections 6047 and 6225, are set out in the printed record at page 72.

The pertinent parts of Sections 63 and 64 are as follows:

63. INDIVIDUAL LIABILITY OF SHAREHOLDERS. — The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. * * *

64. INDIVIDUAL LIABILITY OF SHAREHOLDERS; TRANSFER OF SHARES.—The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagement of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock.

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APR 3
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October TERM 1935

No. [redacted] 11

L. P. CHISHOLM, WALLER HOLLADAY, W. EARL CRANK, T. S. WINSTON and W. R. DUNKUL,
Petitioners,

versus

W. B. GILMER, RECEIVER FOR THE FIRST NATIONAL BANK OF LOUISA, LOUISA, VIRGINIA, Respondent.

SUPPLEMENTARY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MINITREE JONES FULTON,
HOMAN W. WALSH,
Counsel for Petitioners.

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SUPPLEMENTARY BRIEF IN SUPPORT OF PETITION

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IN THE

Supreme Court of the United States

TERM 1936

No. 828

L. P. CHISHOLM, WALLER HOLLADAY, W. EARL CRANK, T. S. WINSTON and W. R. DUNKUL,
Petitioners,

versus

W. B. GILMER, RECEIVER FOR THE FIRST NATIONAL BANK OF LOUISA, LOUISA, VIRGINIA, Respondent.

SUPPLEMENTARY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition for the Writ of Certiorari and supporting Brief were filed herein on March 14, 1935.

We respectfully ask leave of this Honorable Court to file this Supplemental Brief on behalf of petitioners on the following "Questions Involved and Presented" in the petition for the Writ of Certiorari:

First, under headings I, II, III, pages 6 and 7, and for the writ.

Second, under (2), (3), (4), and (7) of the Petition for the Writ at pages 9, 10, 11 and 12, and in the Supporting Brief under Argument I at pages 20 to 28, and IV and V at pages 32 to 46.

First: In addition to what is said in the petition and supporting brief it is respectfully urged that the District Court of the United States *was wholly without jurisdiction to maintain the proceeding by a Notice of Motion issued solely by respondent,* through his attorney, and to enter judgment thereon against petitioners under the Conformity Act, section 914, Revised Statutes of the United States,—since the cause of action sought to be asserted in the instant case was one brought in a Federal Court on a "new cause" of action arising solely under the laws of the United States to recover a double assessment levied in December, 1933, by the Comptroller of the Currency of the United States on certain shares of stock issued in 1930 by the First National Bank of Louisa, Virginia,—a purely Federal Statutory liability imposed solely under and by virtue of Title 12, U.S.C.A., sections 63 and 64, and since there was no "like cause" existing for such double assessment on shares of stock of insolvent national banks under the courts of the State of Virginia.

The holding of the Circuit Court of Appeals affirming the decision of the District Court, therefore, is in *conflict* with the decision of this court in *Coffey* v. *U. S.*, 117 U. S. 233, 6

S. Ct., 717, 29 L. Ed. 890 at 891, where passing directly on this question, it was held:

> "Section 914 prescribes a conformity to the practice in the court of the State only 'as near as may be,' and only 'in like causes.' 'Section 914 of the United States Revised Statutes (Comp. St. 1916, section 1537) *has no application to the case*, as it relates to conformity in practice and pleading, and forms and modes of proceeding in civil causes, other than equity and admiralty, to the practice, pleading, and forms and modes or proceeding existing at the time '*in like cause*' in the courts of record of the State. *There is and can be no 'like causes' in the State Courts, for the action here is one within the exclusive jurisdiction of the Federal Court, and is a new and wholly statutory procedure.*"

So it is in the instant case, where the proceeding by Notice of Motion was wholly unauthorized by a rule of the U. S. District Court or the Conformity Act, section 914, *which expressly prescribed a conformity* to the practice in the courts of the State only "*as near as may be*," and *only* "*in like causes*," and there can be no "like causes" in the State Court, for the action here is a new cause created by the Federal Statute, Title 12, U.S.C.A., sections 63 and 64, and is one within the exclusive jurisdiction of the Federal Court, and section 911, Revised Statutes of the United States, required that the suit should be begun in the District Court of the United States "by a writ or process" issued from the Court under the seal of the Court signed by the clerk, and to bear the teste of the District Judge, "and is not authorized to be begun or issued by respondent by his counsel," and that section has not been followed in the instant case, and the United States District Court is without jurisdiction to entertain the

proceeding. *Dwight* v. *Merritt*, 4 Fed. 614. *Etna Insurance Company* v. *Hallock* (*Etna Insurance Company* v. *Doe*), 6 Wallace 556, 18 L. Ed. 948; *Middleton Paper Company* v. *Rock River Paper Company*, 19 Fed. 252.

In the reecnt case of *United States, to use, etc.*, v. *Boat Harbor Marine Ry. Company, Inc., et al.* (D. Ct. E. D. of Virginia), 58 Fed. (2d) 366, the Court there held "that the Conformity Act applied to all civil causes, other than equity and admiralty causes, which would include *all proceedings at law in the District Court, except for the fact that the latter part of the act limits the recommendation to Conformity to the practice, pleadings and forms, and modes of procedings in "like causes" in the courts of record in the State,"* and said:

> "It has been held, *and it would seem proper*, that a cause of action *arising under a Federal Statute over which the Federal Courts are given jurisdiction*, as they are in cases like the instant one, *is not a 'like cause' in a Federal Court within the meaning of the Conformity Act."*

In *U. S.* v. *Moore* (D. C. E. D. N. Y. 1923), 287 Fed. 879, the Court at page 882 said:

> "There it would seem that by the use of the words 'like causes' it was intended *to eliminate proceedings in bankruptcy of which the State Courts have no jurisdiction*, and, therefore, *there could be no practice or procedure in the State Courts in 'like causes' to which the Federal Courts could conform."*

This case was appealed to the Circuit Court of Appeals and affirmed, 294 Fed. 852, and a Writ of Certiorari was denied by this Court, 34, S. Ct. 331, 68 L. Ed. 860.

In *U. S.* v. *Fifty Boxes, etc., Lace* (D. C. N. Y.), 92 Fed. 601, the Court, then held that the Conformity Act *did not apply* to the manner of executing commissions for taking depositions in revenue cases and cited *U. S.* v. *Coffey, supra,* as authority for that holding.

In the *U. S.* v. *Southern Dredging Company* (D. C., Del.), 251 Fed. 400, the Court there held that where the Federal Statutes provided that a surety company should appoint a statutory agent to accept service of process, and service was left at the statutory agent's house in the presence of his wife:

> "There is and *can be no 'like causes'* in the State Courts, for the action here is one within the *exclusive jurisdiction of the Federal Court, and is a new and a wholly statutory procedure.*"

This is clearly true in the instant case. The action sought to be asserted by the Notice of Motion is a new and an exclusive statutory Federal "cause of action" to recover for an assessment levied in 1934 by the Comptroller of the United States on the shares of stock of an insolvent national bank, of which the Federal Court had exclusive jurisdiction under Title 12, U.S.C.A., sections 63 and 64, providing for such a double assessment, and which "cause" of action was wholly unknown to the common law, and to the State practice, pleading, and forms, and modes of proceeding in the Virginia Court. There was and could be no "like cause" therefore, in the courts of record in that State; and the instant case is not a "like cause" within the meaning of the Conformity Act, as defined in the authorities cited *supra*, and the proceeding had to be under section 911 of the Revised Statutes of the United States.

The District Court of the United States was, therefore, clearly without jurisdiction to maintain the proceeding by

a Notice of Motion which *was begun and issued solely* by the respondent by his attorneys, and was not under the seal of the District Court, signed by the Clerk, and did not bear the teste of the District Judge, as was required by section 911 of the Revised Statutes of the U. S.

The Circuit Court of Appeals in its decision (Op. R. 72), therefore, in affirming the judgment of the District Court, has, therefore, rendered a decision against petitioners in conflict with the decisions of this Court and with the applicable decisions of other Circuit Courts of Appeal of the United States, and has misconstrued and misapplied Title 12, U. S. C. A., sections 63 and 64 and sections 911 and 914 of the Revised Statutes of the United States.

The proceeding in the instant case by Notice of Motion issued by and signed by respondent by his counsel to begin a cause of action arising under the Federal Statutes, Title 12, U.S.C.A., sections 63 and 64, over which the Federal Courts are given exclusive jurisdiction, is not a "like cause of action" within the meaning of the Conformity Act, or by State statutes as to proceedings by Notice of Motion thereon.

Second: Supplementing what has been said in the petition for the writ, under (2), (3), (4) and (7) at pages 9, and 10, and 11, and 12, and in the Supporting Brief under Argument I at pages 20-28, and IV and V at pages 32 and 46; it is respectfully urged that the Circuit Court of Appeals of the Fourth Circuit, in affirming the judgment of the District Court for $22,000 interest jointly and severally against petitioners in 1935, for payment of the entire double assessment on the whole 220 shares of stock, was erroneous, and was based upon wholly extraneous, irrelevant and collateral evidence admitted over the objections and exceptions of Petitioners and other defendants (R. 32-34, 39, 41, 44, 24, 27-28).

This evidence (R. 27-28, 4 to 9) related:

First, to the note given by petitioners and other defendants to the American Bank and Trust Company of Richmond, Virginia, to borrow money, by each of them to pay for his one-eleventh part of the stock previously purchased in 1930 by each of them from the Bank of Louisa (R. 34-35, 39, 42-43, 46, 47, 51-56);

Second, That in 1930 the eleven defendants below severally had on deposit in the Bank of Louisa sundry amounts;

Third, That one of them was then overdrawn in such bank;

Fourth, That some of them were borrowers and had both a direct and indirect liability to such bank;

Fifth, That there were two rival banks in the town of Louisa;

Sixth, That the First National Bank of Louisa had been paying 4% on earnings and had been trying to reduce it to 3%; and

Seventh, That Chisholm in 1935 had brought suit for contribution from the other co-makers of the above note given by them in 1930 to the American Bank and Trust Company (R. 27-28).

It is urged, first, that all of this testimony was extraneous and irrelevant, and, second, that even if relevant, it did not in any way *change the contract whereby each of the petitioners and other defendants had only* "purchased one-eleventh" of the 220 shares of stock for himself from the Bank of Louisa. Supporting Brief, p. 18 (3).

The District Court during the trial (R. 34) and in its opinion (R. 61) found from the evidence (R. 34-35, 37, 39, 40, 43, 46, 47, 48, 50, 51, 53, 54, 55, 56), that each of the petitioners "merely had an undivided one-eleventh interest in the entire block" of 220 shares, and (R. 34) *that the contract of purchase was one contract and that the contract made with the American Bank and Trust Company* to borrow the money to pay for the stock, *was another and separate contract* made between different parties. On this point, the District Court (R. 34) said:

> "The Court: The stock was subscribed for, that is one agreement between the people. That they went down and made a joint promissory note for a certain amount, that is another agreement. A joint judgment was rendered against them," referring to the note given the American Bank and Trust Company.

But, even if the above extraneous evidence should be deemed to be relevant, *then it was so far in conflict with the positive testimony of the petitioners and other defendants, to the effect that each of them had only purchased one-eleventh thereof,* that it necessarily rendered the decision of that question, of *disputed* fact, one to be decided by the jury, and not one to be decided as a matter of law by the court of the motion of respondent for a directed verdict in its favor (R. 63).

Moreover, the Circuit Court of Appeals while finding from the evidence that "each had a one-eleventh interest in the enterprise," it, nevertheless, erroneously held that each of them was responsible for the payment of the entire assessment made by the Comptroller of the Currency on the whole 220 shares of stock (Supplementary Brief, 28-31).

The cases cited in the Court's Opinion did not involve the individual responsibility of shareholders under Title 12, U.S. C.A., sections 63 and 64, for the payment of double assessments made by the Comptroller of the Currency on the shares of insolvent national banks. They are, therefore, not in point or controlling in the instant case, since the responsibility for the payment of the double assessment is purely individual, and several and statutory (Title 12, U.S.C.A., sections 63 and 64) and decisions cited in the Supporting Brief at pages 42-44.

It is thus obvious that the Circuit Court of Appeals failed to consider the Federal Statutes in connection with the fact that the contract made by petitioners and other defendants was to purchase *only* "one-eleventh" of the 220 shares of stock in the block (R. 74), has found by both (R. 61), and likewise failed to consider section 5220 of the Revised Statutes of the United States which defines the liability of the shareholders provided for by section 5151, U.S.R.S., to an "individual liability," and says it "may be enforced" by the receiver of any insolvent national bank.

The authority of the receiver of such insolvent national bank is likewise purely statutory, *and is limited to the powers expressly granted or necessarily implied from the language of the above statutes. First National Bank of St. Louis* v. *State of Missouri, etc.*, 44 S. Ct. R. 213 at 125, 216, 263 U. S. 640 at 659, where this Court said:

> "Moreover, the reasons adduced against the existence of the power *substantively* are conclusive against its existence *incidentally;* for it is wholly illogical to say that a power which by fair construction of the statutes is found to be denied, nevertheless exists as an incidental power. Certainly, an incidental power can avail neither

to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted.

It is therefore respectfully urged that the decision of the Circuit Court of Appeals is in conflict with the above case, and is also in conflict with the decision of this Court in the recent case of *Early* v. *Richardson*, 280 U. S. 496 at 499, 50 S. Ct. 176 at 177, 74 L. Ed. 575, where it was held:

> "That the actual owner *may be held liable for the assessment*, although his name does not appear on the transfer books of the bank, is well settled."

Also in *Ohio Bank* v. *Hulitt*, 204 U. S. 162 at 168, 52 L. Ed. 423 at 427; and *Wells* v. *Larrabee*, 36 Fed. 866, where the Court there held:

> "There is no principle of law or equity which justifies the holding of *a person liable as a stockholder in a corporation, if in fact he is not one*, unless he has knowingly permitted his name to appear as a stockholder and thereby misled parties dealing with the corporation."

In *Markel* v. *Ray*, 75 Minn. 138, 77 N. W. 788 at 790, the Court said:

> "It did not appear that James D. and Robert C. were partners and nothing of the kind appeared in the books of the corporation. Under these circumstances, they appeared to be tenants in common, each appearing to be a holder of an undivided half interest in the stock; and we are of the opinion that Robert C. should not be held liable for more than one-half of the face value of the stock and the devisees for the other half."

These cases clearly establish that the owner of shares of stock in a national bank is *"individually responsible"* for the double assessment made only on the shares severally owned by him, and that the assessment in the instant case is limited to his actual beneficial ownership of each stockholder to his one-eleventh of the 220 shares (R. 35, 39, 32, 43, 46, 47, 49, 53, 54, 56).

The decision of the Circuit Court of Appeals is also in conflict with the following decisions:

In *O'Keefe* v. *Pearson,* 75 Fed. (2d) 673 at 677, it was contended that the stock was transferred to secure *unity of control through voting power,* and it was held that each depositor of the stock was liable *only* to the extent of the stock held for him though it was part of one large certificate. The Court said:

> *"But such contention is of no avail,* for it appears that all the shares of stock in the hands of the depositary were shares *of the Federal National Bank,* each share of which was of the face value of $20, and, such being the case, *it can make no difference on the question of ownership that no specific shares of bank stock were set apart for the defendant to answer to his trust certificates."*

To same effect *Richardson* v. *Shaw,* 209 U. S. 265 at 387 at 379, 28 S. Ct. 512, 52 L. Ed. 835.

In *Beal* v. *Essex, etc., Bank,* 67 Fed. 816, 15 C.C.A. 128 at 129-130, the Court said:

> "We are all of the opinion that in the proper sense of the word 'shareholders' one does not become such *by*

merely making a loan on the security of the stock, no matter what formalities the transaction takes. . . . This view of the word 'shareholders' is strengthened by the expression contained in the early part of section 5151, namely, the words, 'in addition to the amount invested in such shares'."

So that petitioners by making a loan from the American Bank and Trust Company on the security of the shares of stock which each had bought from the First National Bank of Louisa *did not change this contract of purchase by each of one-eleventh*, and did not make each of them liable jointly or severally for payment of the *whole* double assessment thereafter made on the entire 220 shares. The holding in above last cited case was affirmed in *Pauly* v. *State, supra,* 17 S. Ct. at page 470, where this Court held:

"That *the real owners* of the shares of capital stock of the National Bank Association may in every case be termed as Shareholders within the meaning of section 5151" (Now Title 12, section 63).

It is also in conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit in *Metropolitan Holding Co.* v. *Snyder* (November 11, 1935), 79 Fed. (2d), Advance Sheets, 263 at 265, where the Court (Stone and Sanborne, Circuit Judges, and Ragon, District Judge), held:

"The question to be determined is whether, under the plan *adopted* by the *individual appellants* to restore the impaired capital of the bank, *they became the beneficial owners of the stock*, and the holding company a mere agency in carrying out the transaction, or whether the holding company became the actual owner and the relation of the individual appellants to the plan was solely that of stockholders in the holding company,"

and at page 266 the Court, passing on this question, said:

> "The objects of the statute are not to be defeated by mere forms of the transaction. *The courts will look at the relations of parties as they actually are,* or as, by reason of their conduct, they must be assumed to be, for the protection of creditors. Congress did not say that those only should be regarded as shareholders, liable for contracts, debts, and engagements of the banking association, *whose names appear on the stock list* distinctly as shareholders. *Those may be treated as shareholders* of the association within the meaning of section 5151 *who are in fact the real owners of the stock.* *Pauly* v. *State Loan & Trust Co.,* 165 U. S. 606-623, 17 S. Ct. 465, 471, 41 L. Ed. 844."

The Circuit Court of Appeals in holding that each of the petitioners was liable for the payment of the entire double assessment on the whole 220 shares of stock, also erroneously overlooked the fact that the evidence showed that each only purchased one-eleventh, agreed to contribute a definite portion of the purchase price, and to take one-eleventh of the total number of shares. Therefore, even if this made them joint owners of the 220 shares, it, nevertheless, did not establish between them the relation of "joint adventurers" or make each liable for the whole double assessment. *"Bomaster* v. *Carrol,* 23 Fed. (2d), 825 at 827.

It is therefore respectfully urged that the decision of the Circuit Court of Appeals in the instant case involved a Federal question and misconstrued and misinterpreted and misapplied Title 12, U.S.C., sections 63 and 64, and sections 921 and 914 of the Revised Statutes of the United States, and that its decision was in conflict with the applicable decisions

of this and other Federal Courts, and with the weight of the evidence, as well as of the authorities, and that the Writ of Certiorari should be granted.

Respectfully submitted,

MINITREE JONES FULTON,
HOMAN W. WALSH,
Counsel for Petitioners.

April 2, 1936.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1936

No. 828

L. P. CHISHOLM,
WALLER HOLLADAY,
W. EARL CRANK,
T. S. WINSTON AND
W. R. DUNKUM, Petitioners.

v.

W. B. GILMER, RECEIVER FOR THE FIRST NATIONAL BANK OF LOUISA, LOUISA, VIRGINIA, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR L. P. CHISHOLM, WALLER HOLLADAY, W. EARL CRANK, T. S. WINSTON AND W. R. DUNKUM.

OPINION BELOW.

The opinion of the District Court for the Eastern District of Virginia is set out in the Record at pages 52-56. The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported in 81 F. (2d) 120, and is set out in the Record at pages 61-69.

JURISDICTION.

The order below was entered on the 6th day of January, 1936. Petition for Writ of Certiorari was filed on the day of and was granted on the 13th day of April, 1936. The jurisdiction of this Court rests on section 240 (a) of the Judicial Code as Amended by the Act of February 13, 1925 (U. S. C., Title 28, § 347a).

QUESTIONS PRESENTED.

Whether under the conformity act the District Court had jurisdiction to entertain the proceeding instituted by a notice of motion to recover a double assessment from the stockholders of a National Bank, there being no like case in the State Courts.

Whether a notice of motion is process and must be issued under the seal of the Court and bear the teste of the Judge.

STATEMENT.

This case was instituted on May 12, 1934, by a notice of motion filed in the United States District Court for the Eastern District of Virginia, sitting at Richmond, by W. B. Gilmer, Receiver for the First National Bank of Louisa, Virginia, Respondent, to recover $22,000.00 with interest from January 22, 1934, against your petitioners and Charles L. Perkins, W. Worth Smith, Jr., P. B. Porter, Hunter P. Porter, Administrator of H. W. Porter, deceased, J. F. Bickers, Sheriff, Administrator of U. M. Gentry, deceased, and J. P. Donnally in his own right and as Trustee, as an assessment alleged to have been made by the Comptroller of the Currency of the United States on 220 shares of the capital stock of the insolvent First National Bank of Louisa, Virginia, of the par value of $100.00 a share, alleged to have been purchased by them

after having formed a special combination of themselves to buy said stock for profit, as alleged adventurers and owners thereof, and alleging that they were joint and severally liable for such assessment on said stock registered on the books of the bank in the name of J. P. Donnally as Trustee for L. P. Chisholm and others. The judgment was asked against the nine living defendants and the two administrators of the above named decedents (R. 2-3).

PLEAS IN ABATEMENT AND MOTION TO DISMISS AND DEMURRERS.

Pleas in abatement and motions to dismiss the notice of motion for judgment on the ground that it was void and of no effect and that no such action could be maintained in the United States District Court by a notice of motion merely signed and issued by respondent and not under the seal of the Court, nor signed by the clerk, and not bearing the teste of the District Judge (R. 5-8), and that the District Court was without jurisdiction to entertain such proceedings were filed.

The District Court overruled these and sustained this mode of institution of the suit in the United States District Court. Exception was taken to this ruling and error assigned (R. 23).

Demurrers to this notice of motion were then interposed and the notice of motion was amended and the demurrers were then again filed to the amended notice of motion (R. 10-11-12), and were overruled and petitioners excepted and assigned error (R. 14-15, 26-28).

PLEAS OF BANKRUPTCY.

Pleas in bankruptcy were then filed by J. P. Donnally, P. B. and H. W. Porter, C. L. Perkins, and W. Worth Smith, Jr. (R. 17).

PLEAS OF GENERAL ISSUE.

Petitioners pleaded the general issue and filed grounds of defense, U. M. Gentry's Administrator, relying in addition on insanity of his intestate (R. 3-4, 15-19).

The grounds of defense were: (1) Petitioners denied that they had purchased or subscribed, either individually or jointly, for the 230 shares of capital stock of the Bank of Louisa as mentioned in the notice of motion; (2) denied that they had entered into any special combination for the purpose of buying said shares of stock for profit; (3) admitted that each of them had purchased for himself one-eleventh part of the 230 shares of the capital stock of the Bank and stated that the interest of each of them therein was to that extent only; (4) each of the petitioners denied that he was a joint owner thereof and denied that each of them was liable for the payment of the whole amount of the assessment alleged to have been made on the 230 shares of stock (R. 14-16).

PROCEEDINGS AT TRIAL.

At the trial, on April 25, 1935, U. M. Gentry's Administrator moved that the case be continued as to him by reason of his having filed a plea of insanity on the part of his decedent at the time of the alleged transaction. Petitioners objected to this continuance on the ground that the alleged suit was joint against eleven defendants, and only a joint judgment could be entered binding upon all. This motion was overruled and an exception was noted and assigned as error (R. 21).

Upon the trial petitioners objected to the admission of certain evidence and exceptions were noted and error assigned (R. 23-33, 34, 39-41, 44, 46).

At the conclusion of respondent's evidence, petitioners moved for a directed verdict in their favor on the grounds

that the evidence showed that each of them had purchased and were owners individually on only one-eleventh interest in the 220 shares of stock and that it had not been shown that they had formed a special combination or a joint adventure or partnership for profit or that each was jointly liable for the payment of the whole of this alleged assessment on the 220 shares. This motion was overruled and exception noted and error assigned (R. 39).

Petitioners then introduced their evidence and at the conclusion of all the evidence again moved for a directed verdict in their favor on the same grounds, which was overruled and exception noted and error assigned (R. 57-63).

Respondent who has also previously moved for a directed verdict and had then withdrawn it until after the Court had announced it would overrule petitioners' motions, then again moved for a directed verdict in his favor, which motion was granted and exception was noted and error assigned (R. 50-58).

The jury thereupon rendered the following verdict:

> "We, the jury, at the direction of the Court, find in favor of the plaintiff against the defendants W. R. Dunkum, Thomas S. Winston, W. Earl Crank, Waller Holladay, and L. P. Chisholm, in the amount of $22,000.00 (Twenty-two thousand dollars) together with interest from January 22nd, 1934, until paid" (R. 23, 63).

Petitioners thereupon moved to set aside the verdict of the jury and grant a new trial on grounds specifically stated, which motion was overruled and the Court entered judgment on the verdict, and exception was noted and error assigned (R. 22-26, 63).

ASSIGNMENTS OF ERROR.

Petitioners thereupon filed their assignments of error

(R. 26-28) and filed their bills of exception within the time prescribed by law (R. 28, 64).

An appeal was thereupon allowed to the Circuit Court of Appeals of the United States for the Fourth Circuit which, on January 6, 1936, after hearing it, affirmed the judgment of the District Court with costs (R. 61).

I

The District Court of the United States was wholly without jurisdiction to maintain the proceeding by a notice of motion issued solely by respondent, through his attorney, and to enter judgment thereon against petitioners under the Conformity Act, section 914, Revised Statutes of the United States,—since the cause of action sought to be asserted in the instant case was one brought in a Federal Court on a "new cause" of action arising solely under the laws of the United States to recover a double assessment levied in December, 1933, by the Comptroller of the Currency of the United States on certain shares of stock issued in 1930 by the First National Bank of Louisa, Virginia,—a purely Federal Statutory liability imposed solely under and by virtue of Title 12, U. S. C. A., sections 63 and 64, and since there was no "like cause" existing for such double assessment on shares of stock of insolvent national banks under the courts of the State of Virginia.

The holding of the Circuit Court of Appeals affirming the decision of the District Court, therefore, is in conflict with the decision of this court in Coffey v. U. S., 117 U. S. 233, 6 S. Ct. 717, 29 L. Ed. 890 at 891, where passing directly on this question, it was held:

> "Section 914 prescribes a conformity to the practice in the court of the State only 'as near as may be' and only 'in like causes.' 'Section 914 of the United

States Revised Statutes (Comp. St. 1916, section 1537) has no application to the case, as it relates to conformity in practice and pleading, and forms and modes of proceeding in civil causes, other than equity and admiralty, to the practice, pleading, and forms and modes or proceeding existing at the time 'in like cause' in the courts of record of the State. There is and can be no 'like causes' in the State Courts, for the action here is one within the exclusive jurisdiction of the Federal Court, and is a new and wholly statutory procedure."

So it is in the instant case, where the proceeding by notice of motion was wholly unauthorized by a rule of the U. S. District Court (Rule 14 printed in appendix), or the Conformity Act, section 914, which expressly prescribed a conformity to the practice in the courts of the State only "as near as may be," and only "in like causes," and there can be no "like causes" in the State Court, for the action here is a new cause created by the Federal Statute, Title 12, U. S. C. A., sections 63 and 64, and is one within the exclusive jurisdiction of the Federal Court, and section 911, Revised Statutes of the United States, required that the suit should be begun in the District Court of the United States "by a writ or process" issued from the Court under the seal of the Court signed by the clerk, and to bear the teste of the District Judge, "and is not authorized to be begun or issued by respondent by his counsel," and that section has not been followed in the instant case, and the United States District Court is without jurisdiction to entertain the proceeding. Dwight v. Merritt, 4 Fed. 614. Etna Insurance Company v. Hallock (Etna Insurance Company v. Doe), 6 Wallace 556, 18 L. Ed. 948; Middleton Paper Company v. Rock River Paper Company, 19 Fed. 252.

In the recent case of United States, to use, etc. v. Boat

Harbor Marine Ry. Company, Inc., et al (D. Ct. E. D. of Virginia), 58 Fed. (2d) 366, the Court there held "that the Conformity Act applied to all civil causes, other than equity and admiralty causes, which would include all proceedings at law in the District Court, except for the fact that the later part of the act limits the recommendation to Conformity to the practice, pleading and forms, and modes of proceedings in "like causes" in the courts of record in the State", and said:

> "It has been held, and it would seem proper, that a cause of action arising under a Federal Statute over which the Federal Courts are given jurisdiction, as they are in cases like the instant one, is not a 'like cause' in a Federal Court within the meaning of the Conformity Act."

In U. S. v. Moore (D. E. C. D. N. Y. 1923), 287 Fed. 879, the Court at page 883 said:

> ". . . and it would seem that by the use of the words 'like causes' it was intended to eliminate proceedings in bankruptcy and contempts in such proceedings from the operation of the statute of conformity, as there are no such 'like causes' as bankruptcy of which the state courts have jurisdiction, and therefore there could be no practice or procedure in state courts in 'like causes' to which the federal courts could conform."

This case was appealed to the Circuit Court of Appeals and affirmed, 294 Fed. 852, and a Writ of Certiorari was denied by this Court, 34 S. Ct. 331, 68 L. Ed. 860.

In U. S. v. Fifty Boxes, etc., of Lace (D. C. N. Y.), 92 Fed. 601, the Court held that the Conformity Act did not apply to the manner of executing commissions for taking depositions in revenue cases and cited U. S. v. Coffey, *supra*, as authority for that holding.

In the U. S. v. Southern Dredging Company (D. C., Del.), 251 Fed. 400, where the Federal Statutes provided that a surety company should appoint a statutory agent to accept service of process, and service was left at the statutory agent's house in the presence of his wife, the Court said:

> "There is and can be no 'like causes' in the State Courts, for the action here is one within the exclusive jurisdiction of the Federal Court, and is a new and a wholly statutory procedure."

This is clearly true in the instant case. The action sought to be asserted by the notice of motion is a new and an exclusive statutory Federal "cause of action" to recover for an assessment levied in 1934 by the Comptroller of the United States on the shares of stock of an insolvent national bank, of which the Federal Court had exclusive jurisdiction under Title 12, U. S. C. A., sections 63 and 64, providing for such a double assessment, and which "cause" of action was wholly unknown to the common law, and to the State practice, pleading, and forms, and modes of proceeding in the Virginia Court. There was and could be no "like cause" therefore, in the courts of record in that State; and the instant case is not a "like cause" within the meaning of the Conformity Act, as defined in the authorities cited *supra,* and the proceeding had to be under section 911 of the Revised Statutes of the United States.

The District Court of the United States was, therefore, clearly without jurisdiction to maintain the proceeding by a notice of motion which was begun and issued by the respondent by his attorneys, and was not under the seal of the District Court, signed by the Clerk, and did not bear the teste of the District Judge, as was required by section 911 of the Revised Statutes of the U. S.

The Circuit Court of Appeals in its decision (Op. R.

72), in affirming the judgment of the District Court, has, therefore, rendered a decision against petitioners in conflict with the decisions of this Court and with the applicable decisions of other Circuit Courts of Appeals of the United States, and has misconstrued and misapplied Title 12, U. S. C. A., sections 63 and 64 and sections 911 and 914 of the Revised Statutes of the United States.

The proceeding in the instant case by notice of motion issued by and signed by respondent by his counsel to enforce a cause of action arising under the Federal Statutes, Title 12, U. S. C. A., sections 63 and 64, over which the Federal Courts are given exclusive jurisdiction, is not a "like cause of action" within the meaning of the Conformity Act, or by State Statutes as to proceedings by notice of motion thereon.

II

The District Court was also without jurisdiction to maintain this suit under Title 12, U. S. C. A., sections 63 and 64 under which the shareholders of National Banking Associations are made individually responsible, and not one for another, and only to the extent of the amount invested by each in the stock thereof, at the par value thereof in addition to the amount invested in such shares of stock by each of them individually, since a joint action cannot lie under this Statute on a several liability and since this is a suit in a Federal Court upon an individual cause of action created by a Federal Statute, and since the Conformity Act has no application to the cause of action sought to be asserted in the United States District Court in this case.

On this point the District Court during the trial (R. 34), and in its opinion (R. 61), found (R. 34-35, 37, 39-40, 43, 46, 47, 48, 51, 53, 54, 55, 56), that each of the Petitioners merely had an undivided one-eleventh interest

in the entire block of 220 shares, and that the contract and purchase of each of them was for only one-eleventh and since the Circuit Court of Appeals for the Fourth Circuit likewise found that "each had a one-eleventh interest in the enterprise."

It is thus obvious that the Circuit Court of Appeals failed to consider the Federal Statutes in connection with the fact that the contract made by petitioners and other defendants was to purchase only "one-eleventh" of the 220 shares of stock in the block (R. 74), as found by both (R. 61), and likewise failed to consider section 5220 of the Revised Statutes of the United States which confines the liability of the shareholders provided for by section 5151, U. S. R. S., to an "individual liability," and says it "may be enforced" by the receiver of any insolvent national bank.

The authority of the receiver of such insolvent national bank is purely statutory, and is limited to the powers expressly granted or necessarily implied from the language of the above statutes. First National Bank of St. Louis v. State of Missouri, etc., 263 U. S. 640, 659, 44 Sup. Ct. R. 213, 215, 216, where this Court said:

> "Moreover, the reasons adduced against the existence of the power substantively are conclusive against its existence incidentally; for it is wholly illogical to say that a power which by fair construction of the statutes is found to be denied, nevertheless exists as an incidental power. Certainly, an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld, nor to enlarge powers given; but only to carry into effect those which are granted."

III

The Federal Courts have repeatedly held that a notice of motion issued and signed solely by a plaintiff for the

purpose of instituting an action at law in a District Court of the United States, was a process within the meaning of Revised Statutes of the United States, Section 911 (Title 28, U. S. C. A., Section 721), and to be valid it had to be under the seal of the District Court, signed by the clerk, and bear the teste of the District Judge.

The action in the instant case was begun by a notice of motion for a personal judgment for money. It was not under the seal of the District Court, nor signed by the clerk, and did not bear teste of the District Judge (R. 1-2). The District Court was without jurisdiction to entertain such action under Title 28, U. S. C. A., Section 721, and the United States Marshal was likewise without authority to serve such notice of motion under Title 28, U. S. C. A., Section 503. The District Court never acquired jurisdiction at all of the suit because there was no valid service of a valid process. The decision of the Circuit Court of Appeals affirming such judgment is erroneous and in disregard and in violation of such statutes and in conflict with the decisions of other Circuit Courts of Appeal and the weight of authority and has created a conflict in the Federal decisions on this important matter of Federal law, and involves a Federal question under the laws of the United States.

The whole proceeding was contrary to Title 28, U. S. C. A., Section 721, which provides:

> "All writs and processes issuing from the Courts of the United States shall be under seal of the Court from which they issue, and shall be signed by the clerk thereof."

Thus in 1 Rose's Code of Fed. Proc., § 901, it is said:

> "Federal Courts derive their power to issue from the common-law writs from R. S., Section 911. The form and general style of Federal writs are also prescribed by Congress. So that the conformity re-

quirement of R. S., Section 914 has little or no application to Federal writs. The conformity law applies, however, to process in common-law causes, except as regards form and style, which Congress has prescribed, and as respects service, it being provided that Federal process shall be served by the marshal. These requirements as to form and service forbid adoption in the Federal Courts of the New York and Wisconsin practice in so far as it permits plaintiffs' attorney to issue and serve the summons."

The decision of the Circuit Court of Appeals is also in direct conflict with Peaslee v. Haberstro, Fed. Cas. No. 10,884, where the Court held:

"The motion to set aside the summons must be granted upon the ground that the summons was not signed by the clerk or under the seal of the court. Section 911 of R. S. of U. S. prescribed that 'all writs and processes issuing from the Court of the United States shall be under seal of the Court from which they issue and shall be signed by the clerk thereof.' This provision is not inconsistent with and, therefore, is not repealed by the subsequent Act of Congress (Act of June 1, 1872, Section 5, 17 Stat. 197) now embodied in Section 914 of R. S. which enacts that 'the practice, etc. . . . (Conformity Act). Giving due effect to the latter act, the practice and forms and mode of proceeding in Courts of the United States in Common law actions is to conform to and be regulated by that of the State Courts when there is no statute of the United States prescribing different practice or forms or modes of procedure. When the statutes of the United States are silent, the practice of the State Courts will prevail, but when those statutes speak they are controlling. If the summons in this case had been signed by the clerk, it could be amended as regards the seal. As it is there is no summons in the nature of process known to this Court. The summons is set aside."

So for the same reasons the summons issued by and signed by the plaintiff in the instant case should have been set aside.

In Dwight v. Merrit (Cir. Ct. S. D. N. Y.), 4 Fed. 614, a motion to set aside a summons under New York practice, Blatchford, Circuit Judge, said:

> "In this case an attempt has been made to commence a suit at common law in this Court by serving on the defendant a paper purporting to be a summons in the form presented by the statute of New York for commencing a civil action. It is signed by the plaintiffs' attorney, but is not under seal of the Court. . . . A summons, or notice to the defendant for the commencement of a suit is certainly process, quite as much as a capias or a subpoena to appear and answer is process. The statute intends that all process shall issue from the Court, where such process is to be held to be the action of the Court, and that the evidence that it issues from the Court and is the action of the Court shall be the seal of the Court and the signature of the clerk. It is clear that a signature by the plaintiffs' attorney without a seal and an issuing from the office of such attorney cannot be submitted. There is nothing in the provisions of Section 914 which abrogates the provisions of Section 911. The two must be so construed as to stand together. Peaslee v. Haberstro, 15 Blatch. 472. The principle of that decision has been generally adopted in applying Section 914 to the practice of the Federal Courts in suits at common law. That principle is that where Congress has by statute pointed out a specific course of procedure, or has legislated, generally upon the subject matter embraced or involved by the proceedings sought to be pursued, such legislation must be followed, although opposed to the forms and modes of proceeding prevailing in the state Courts and established by state statutes. Defect not amendable."

In Johnson v. Healy, Fed. Cas. No. 7389, it was also said:

"In the case of Martin v. Criscuola, 10 Blatchf. 211, Fed. Cas. No. 9159, it was held that a summons not issued by a Court, but merely issued by the plaintiffs' attorney, was not a proper summons. That decision, on the view that the summons is process and must, under the statutes of the United States, and notwithstanding the provisions of the Act of 1872 and of Section 914 of R. S., be issued by the Court and have the authentication of the Court."

In U. S. v. Mitchell, 223 Fed. 805 (E. D. N. Y.), the Court, distinguished between form of process and manner of service, said:

"Federal legislation must, of course, be followed, although opposed to the practice and procedure of the state Courts. U. S. Rev. St. Section 911 (Comp. St. 1913, Section 1534). Accordingly it has been held that an action may not be commenced in the Federal Courts by a summons issued in the name of the plaintiff's attorney pursuant to the mode of commencing actions in the Courts of the State of New York. Martin v. Criscuola, 10 Blatchf. 211, Fed. Cas. No. 9,159; Peaslee v. Haberstro, 15 Blatchf. 472, Fed. Cas. No. 10,884; Dwight v. Merrit (C. C.), Fed. 614."

In Middleton Paper Co. v. Rock Paper Co., 19 Fed. 252, it was said:

"Under the state law in this state and in New York and some other states, the plaintiff's attorney issues the summons, which is the commencement of a suit, but I believe it has been uniformly held, in view of the provisions of Congress, that this cannot be done in the Federal Courts. . . ."

"And the summons served upon him (the garnishee) is the 'process' by which the court is to get jurisdiction of the action, if it gets it at all. It comes within any

definition of process with which the court is acquainted. The summons, notice, writ or whatever it may be called, by virtue of which a defendant is required to come into court and answer, litigate his rights, and submit to the personal judgment of the court, must be 'process within the meaning of the law of congress' and the rule of the court, which is to be issued by the clerk of this court, under seal of the court and tested in the name of the chief justice of the United States."

In re Condemnation Suits, 234 Fed. 443 (E. D. Tenn.) Sanford, Judge, said:

"I think it entirely clear, both upon principle and under the authorities, that in any original suit in a Federal Court which must be commenced by a summons or other process of the Court itself, such process must be signed by the clerk and issued under seal of the Court to be valid, regardless of any different provision as to the form of a summons in the state Courts, the general conformity statutes not operating to waive this specific requirement as to the process in the Federal Courts embodied in Section 911 of the Rev. Statutes (citing cases)."

In Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931, 932, Mr. Justice Miller, delivering the opinion of this Court, distinguished and determined the manner of exercise of different sorts of jurisdiction thus:

"Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the process of the cause.

"Jurisdiction of the res is obtained by the seizure under process of the Court, whereby it is held to abide such order as the Court may make concerning it."

In Boswell v. Otis, 9 How. 336, 13 L. Ed. 164, this Court again said:

"Jurisdiction is acquired in one of two modes: First, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the Court."

Jurisdiction was not acquired in either of the two modes in the instant case.

In Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, 570, this Court again distinguished the use of substituted service by notice in an *in rem* proceeding from process which is required to give jurisdiction against the person.

In the case at bar the District Court was called upon to exercise a jurisdiction "against the person," and under the above Federal Statute and decisions, jurisdiction could only be acquired by a process issued by the District Court, signed by the clerk, and bearing the teste of the Judge. (U. S. C. A., Title 28, Section 721). "Lex ita est". Where Congress has specified a procedure it must be followed.

NOTICE OF MOTION IS PROCESS.

The Circuit Court of Appeals held that the notice of motion for judgment in the instant case was under the Virginia statute a proper method of procedure to obtain a personal money judgment against petitioners in the United States District Court (R. 72).

This holding is in direct conflict with Title 28, U. S. C. A., Sections 721 and 503, and with the decisions of other Circuit Courts of Appeal, and the weight of authority pointed out *supra*. This conflict in the Federal decisions should be settled by this Court.

Hughes Fed. Proc. 2nd Ed., Section 137, referring to Title 28, U. S. C. A., Section 721, says:

"This excludes procedure by motion to recover money

common in some states when the notice is simply signed by the attorneys. . . . A motion to recover money, when authorized by state practice, can be used in the Federal Courts; but in such case the notice of motion . . . must be signed, not by the attorneys, but by the clerk, and must be under the seal of the Court."

Hughes in his 6th Edition, Section 3584, again says:

"In general the forms of such process that obtain in the State courts are adopted in the Federal Courts, except that there can be no departure from the Federal statutory requirement as to the sealing, signing and testes of writs and processes."

The notice of motion in the case at bar departed from these Federal statutory requirements, and there was no valid service of a valid process, and the judgment was void for want of jurisdiction, and the Circuit Court of Appeals for the Fourth Circuit erred in not so holding. Moreover, the Supreme Court of Appeals of Virginia in Hot Springs Co. v. Schreck, 131 Va. 581, 584, referring to the proceeding of notice of motion in the State Courts said:

"We have held in a number of cases that the notice under Section 6046, takes the place of the writ and declaration. Morotock Ins. Co. v. Pankey, 91 Va. 259, 21 S. E. 487; Security Loan Co. v. Fields, 110 Va. 827, 67 S. E. 342, and cases cited."

This holding by the highest Court of the States as to the notice of motion taking the place of the writ and declaration . . . a process under the Virginia statute—should have been regarded as binding upon the United States District Court and the Circuit Court of Appeals in the instant case. The notice of motion is clearly with-

in Section 911, R. S., which declares that the exercise of the judicial power of the United States shall be by a paper signed, and authenticated by its officers. The decision of the Circuit Court of Appeals for the Fourth Circuit in the instant case, as well as its former decision in Ely v. Gamble, 75 Fed. (2nd) 171, is erroneous and in conflict with the decisions of other Circuit Courts of Appeal on the same matter, and in conflict with the great weight of authority, and with the U. S. Revised Statute, Section 911. These important Federal questions should be settled by this Court.

IV

Moreover, the only provision in the Federal law for service of process in a "personal action to recover a money judgment" in the United States Courts is U. S. Code, Title 28, Section 503. It provides:

> "It shall be the duty of the marshal of each district to attend to the District Courts when sitting therein, and to execute, throughout the District, all lawful process directed to him, and issued under the authority of the United States. (R. S. Section 787.)"

The United States marshal, therefore, had no authority to serve the notice of motion in the instant case under Section 503, Title 28, U. S. C. A. *supra*, and the final judgment and decision of the District Court in the instant case was a nullity and void for entire want of jurisdiction to entertain such action.

Since the double liability of the Stockholders is a Federal cause of action and there is no like cause in the State Court, the District Court is without jurisdiction to try the case instituted by a notice of motion. Since the notice of motion is process it must be issued under the seal of the Court and bear the teste of the Judge. The notice

of motion in this case was merely signed and issued by respondent and did not give the Court jurisdiction to try this case. The attempted institution of this suit by a notice of motion being void, the District Court had no jurisdiction to enter a judgment against these Petitioners, and it is submitted the judgment of that Court and of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

MINITREE JONES FULTON,
HOMAN W. WALSH,
LYTTELTON WADDELL,
Counsel for Petitioners.

APPENDIX.

Rules of the District Court of the United States for the Eastern District of Virginia

January 1928.

Adoption of State Practice.

The rules of practice and pleading and the forms and modes of proceeding, including the laws relating to judgments, attachments, and executions prescribed by the Code of Virginia for the government of the common-law courts of the State, and the acts passed or to be passed amendatory thereto or any rules of practice made by authority thereof, shall govern this court on the common-law side, except where they conflict with the Constitution or laws of the United States. This shall include motions, provided they conform to Section 911, United States Revised Statutes, and supplementary proceedings, which latter may be had before a United States commissioner.

FILE COPY

APR

IN THE

Supreme Court of the United States,

OCTOBER TERM 1935

No. [redacted] 11

L. P. CHISHOLM,
WALLER HOLLADAY,
W. EARLE CRANK,
T. S. WINSTON AND
W. R. DUNKUM, Petitioners.

v.

W. B. GILMER, RECEIVER FOR THE FIRST NATIONAL BANK OF LOUISA, LOUISA, VIRGINIA, Respondent.

REPLY TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MURRAY M. McGUIRE,
JOHN S. EGGLESTON,
GEORGE GILMER,
Counsel for Respondent.

THE MICHIE COMPANY, PRINTERS
CHARLOTTESVILLE, VA.

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IN THE

Supreme Court of the United States.

OCTOBER TERM 1935

No. 858

L. P. CHISHOLM,
WALLER HOLLADAY,
W. EARLE CRANK,
T. S. WINSTON AND
W. R. DUNKUM, Petitioners.

v.

W. B. GILMER, RECEIVER FOR THE FIRST NATIONAL BANK OF LOUISA, LOUISA, VIRGINIA, Respondent.

REPLY TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your respondent prays that a writ of certiorari to the Circuit Court of Appeals of the United States for the Fourth Circuit to review its final judgment in this case, entered January 7, 1936 (R. 79), be refused.

There is no error in the finding of the Trial Court or the Circuit Court of Appeals, and there is no novel question involved, and no issue upon which there is a different ruling by different Circuit Courts of Appeal. The apparent difference in the holding of the New York District and Circuit Courts and the other Courts is explained in the

case of Eley v. Gamble, 75 F. (2d) 171, 172, 173. The grounds on which the writ is requested are as follows:

1. The action was commenced by notice without process.
2. The case was continued as to the personal representative of a decedent on plea of insanity.
3. The Court found defendants were joint adventurers and jointly and severally liable for stock assessments.
4. Errors in rulings on admissibility of evidence. This last point is not argued in the petition.

We will discuss the first three in the order named.

PETITIONERS' OBJECTION TO JURISDICTION

1. Petitioners contend that no process can issue out of a Federal Court under section 721 of the Judicial Code of the United States unless sealed with the seal of the Court and signed by the Clerk.

2. That no persons except those who voluntarily appear can be made a party defendant to a proceeding in a Federal Court so as to get a personal judgment against them unless served with process issued under section 721 of the Judicial Code.

3. That this action was commenced without process under the seal of the Court and signed by the Clerk, and that therefore the Court acquired no jurisdiction over the person of any of the peitioners.

It is conceded that process *issuing from a Federal Court* must be under the seal of the Court and signed by the Clerk. It is also true that section 106 of the Virginia Constitution provides,

> "Writs shall run in the name of the Commonwealth of Virginia and be attested by the Clerk of the several Courts. . . ."

But this section of the Virginia Constitution has not prevented the institution of actions in Virginia by what is known in the Virginia practice as notice of motion, for

more than seventy-five years. In fact its constitutionality seems never to have been questioned in the Virginia state courts. For many years this has been almost the only form of civil action brought in the common law courts of Virginia. Similarly since the case of Leas and McVitty v. Merriman, 132 Fed. 510 decided by the United States District Court of the Western District of Virginia in 1904 it has become the general form of common law civil action in the Federal Courts of Virginia. The legality of it from 1904 to 1934 was apparently never questioned in the Federal Courts though 14% to 95% of the cases in the Federal Courts were instituted by it. Eley v. Gamble, 75 Fed. (2d) 171, 173.

NATURE OF PROCEEDINGS BY NOTICE OF MOTION FOR JUDGMENT

> "The procedure by motion (after notice) for a judgment is practically what is known as 'code pleading,' plain and simple, and is destitute of the formalities usual in common-law actions. The notice takes the place of both the writ and declaration in common-law actions. It takes the place of the writ by notifying the defendant when and where he is to appear, and of the declaration by setting out the cause of complaint. As hereinafter stated, the notice is, in legal contemplation, presumed to have been prepared by the plaintiff himself, or some layman, and hence great liberality of construction is indulged by the courts in determining its sufficiency. It is wholly informal, and, as it is always returnable to some day of a term of court, there are no proceedings at the rules. The notice prior to its return to the clerk's office is not an official document, and the clerk makes no note of it generally until it has been executed and returned to his office. Then and then only is it an official document." Burks Pleading & Practice, sec. 153, pp. 219, 220.

This is the great practice work of the State of Virginia. It was prepared by the late Judge Martin P. Burks for

years head of the law school at Washington & Lee University and later from 1917 to 1928 Judge of the Supreme Court of Appeals of Virginia. It has been for twenty years the text book on Virginia Pleading and Practice used at the University of Virginia law school.

Section 6046 authorizing this procedure is printed in the Appendix, page 17.

NOTICE OF MOTION FOR JUDGMENT NOT PROCESS OR WRIT

The notice of motion is not process under section 721 of United States Code or a writ under section 106 of Virginia Constitution. It differs from process as follows:

1. Process is signed by the Clerk of the Court and the notice of motion by the party or his attorney.

2. Process runs in the name of King, President or State and notice in the name of the plaintiff.

3. Process in Virginia is directed to the Sheriff or other Court officer. A notice is directed to the defendant.

4. A process is a Court paper from its issuance. A notice is a Court paper only when returned to the Clerk of the Court after being executed.

5. Process must generally be served by an officer. A notice under section 6041 of the Code is sufficient "which has reached its destination, within the time prescribed by law . . . although not served in the manner above mentioned."

6. Issuance of a process stops the running of the statute of limitations. Only the return of the executed notice to the Clerk's Office stops the statute. Furts Bros. v. Banks, 101 Va. 208, 42 S. E. 360, Burks Pleading & Practice 2nd Ed. 241, 242.

7. Process is a command to the party against whom it is issued. A notice is not a command but is merely notification of the proposed action of the plaintiff.

This was first held in Kain v. Ashworth, 119 Va. 605, 89 S. E. 857, September 11, 1916.

". . . A process emanates from a court and under the provisions of section 6055 is usually directed to the sheriff of the county, while a notice which takes the place of the writ and declaration is directed to the defendants named therein and has its emanation in the act of the plaintiff in sending it forth, and may be served by a layman." Wood v. Kane, 143 Va. 281, 286, 89 S. E. 857. (Sept. 1925.)

This is the usual and proper procedure in the United States District Courts in Virginia. The practice in the Eastern District of Virginia and the law is very fully gone into by the United States Circuit Court of Appeals in 1935 in the case of Eley v. Gamble, 75 F. (2d) 171. An able and carefully worked out opinion was handed down by Judge Parker the senior Circuit Judge. We quote at length from this opinion:

"These are appeals from judgments in favor of the receiver of the First National Bank of Portsmouth, Va., in actions instituted by him to recover on stock assessments made by the Comptroller of the Currency against the stockholders of that bank. All of these actions except three, Nos. 3771, 3774, and 3775, were instituted by notice of motion for judgment pursuant to the Virginia statute, Code of 1930, sec. 6046; and in each of them a plea in abatement was filed on the ground that the notice of motion did not conform to section 911 of the Revised Statutes (28 U. S. C. A., sec. 721) requiring that 'all writs and processes issuing from the courts of the United States' shall be under the seal of the court from which they issue, bear teste of the judge, and be signed by the clerk. In No. 3772 the additional point was raised, by motion to dismiss, that the notice of motion had not been properly served upon the defendant. Nos. 3771, 3774 and 3775 were actions of debt, in each of which a demurrer was filed on the ground that debt would not lie to recover in such case. On the trial there was a motion by the defendant in each case for a directed verdict, on the ground that plaintiff had not proven nonpayment of the stock as-

sessments, or that the defendants owned the stock on which assessments were laid, or were the same persons shown in the books as owners of the stock.

"The appeals in the various cases present the following questions for our consideration: (1) Whether action can be commenced in the federal courts in Virginia by notice of motion under the Virginia statute without compliance with section 911 of the Revised Statutes (28 U. S. C. A., sec. 721); (2) whether service of notice of motion in accordance with the provisions of the Virginia statute is sufficient service to give a federal court in Virginia jurisdiction of the parties in an action so commenced; (3) whether debt is an appropriate form of action for the recovery of a stock assessment; and (4) whether the defendants were entitled to a directed verdict upon any of the grounds mentioned. We think that all of these questions must be answered in favor of the receiver.

"On the first question, it is clear that, as the commencement of an action is a matter of procedure, it is governed by the state practice. 28 U. S. C. A., sec. 724; Burns Mortgage Co. v. Fried, 292 U. S. 487, 54 S. Ct. 813, 79 L. Ed. 1380, 92 A. L. R. 1193. And here the practice prescribed by the state statute was clearly followed in all of the cases. It is argued that section 911 of the Revised Statutes (28 U. S. C. A., sec. 721), which requires all writs and processes issuing from the courts of the United States to be under the seal of the court and to be signed by the clerk, is applicable to the notice of motion under the statute of Virginia; but the answer to this is that the notice of motion is not a writ or process issuing from the court. The notice takes the place of the writ and declaration under the Virginia practice. Virginia Hot Springs Co. v. Schreck, 131 Va. 581, 109 S. E. 595; Security Loan & Trust Co. v. Fields, 110 Va. 827, 67 S. E. 342; Morotock Ins. Co. v. Pankey, 91 Va. 259, 21 S. E. 487. But it is not process emanating from a court and subject to the restrictive provisions relating to such process. Wood v. Kane, 143 Va. 281, 129 S. E. 327, 329; Kain v. Ash-

worth, 119 Va. 605, 89 S. E. 857. As said in Wood v. Kane, supra: 'A process emanates from a court, and under the provisions of section 6055 is usually directed to the sheriff of the county, while a notice, which takes the place of the writ and declaration, is directed to the defendants named therein, and has its emanation in the act of the plaintiff in sending it forth, and may be served by a layman.'

"The state of Virginia has seen fit to provide that, in lieu of the procedure followed in actions at law, a party entitled to maintain such action may proceed by motion before any court which would have jurisdiction of the action, upon giving 15 days' notice of the motion to the party against whom relief is asked. Code of Va. of 1930, sec. 6046. There is no reason why the state may not provide for action by the court upon notice of this character; for it is well settled that due process does not require any particular form or method of procedure. It is sufficient if reasonable notice and reasonable opportunity to be heard and to present any claim or defense are afforded; due regard being had to the nature of the proceeding and the character of rights which may be affected by it. State of Missouri ex rel. Hurwitz v. North, 271 U. S. 40, 46 S. Ct. 384, 70 L. Ed. 82; Iowa Central R. Co. v. State of Iowa, 160 U. S. 389, 16 S. Ct. 344, 40 L. Ed. 467. And it would largely defeat the purposes of the Uniformity Act if the courts should hold the procedure under the notice of motion statute inapplicable to actions in the federal court. Letters of the clerk and deputy clerks of the District Court for the Eastern District of Virginia, appended to the brief of appellee, show that 95 per cent of the common-law actions instituted in Richmond in recent years, 33 1/3 per cent of those instituted at Norfolk, and 14 per cent of those instituted at Alexandria, have been commenced by notice of motion. 'The object of the statute was to simplify and shorten pleadings and other proceedings, to afford a more speedy remedy for the enforcement of contracts, and give suitors a plain and summary proceeding for the

recovery of judgments.' Burk's Pleading & Practice (2d Ed.) 222. The members of the bar have made wide use of the practice which it prescribes, and there is no reason why it should not be followed in the federal courts in accordance with the mandate of the Conformity Act.

"The late Judge McDowell went into this matter very fully in Leas & McVitty v. Merriman (C. C.) 132 F. 510, holding that the state practice established by the notice of motion of judgment statute should be followed under the Conformity Act and that section 911 of the Revised Statutes (28 U. S. C. A., sec. 721) was not applicable. The opinion in this case fixed the practice which has been followed in the federal courts of Virginia for more than 30 years; and we need do no more than refer to the opinion as a clear exposition of the law applicable in the premises. It has been followed by Judge McDowell in Schofield v. Palmer (C. C.) 134 F. 754; and by Judge (later Mr. Justice) Sanford In re Condemnation Suits by United States (D. C.) 234 F. 443, 448, and cited with approval by the Circuit Court of Appeals of the Ninth Circuit in Perris Irr. Dist. v. Turnbull, 215 F. 562, 564. In the Condemnation Suits Case in 234 F. 443, 445, Judge Sanford was dealing with proceedings in condemnation in which the owners of land were brought before the court by service of notice, and by publication as to nonresidents, as allowed by the statutes of Tennessee. It was objected that, because of the requirement of section 911 of the Revised Statutes (28 U. S. C. A., sec. 721), the proceeding should have been commenced by summons issued under the seal of the court and signed by the clerk. In upholding the proceedings under the Tennessee statute and holding that section 911 had no application, Judge Sanford said:

'I think it entirely clear, both upon principle and under the authorities, that in any original suit in a Federal court which must be commenced by a summons or other process of the court itself, such process must be signed by the clerk and issued under the seal of the court, to

be valid, regardless of any different provision as to the form of a summons in the State courts, the general conformity statute not operating to waive this specific requirement as to the process in the Federal courts embodied in section 911 of the Revised Statutes (28 U. S. C. A., sec. 721). Martin v. Criscuola, 10 Blatchf, 211, 16 Fed. Cas. 892 (No. 9,159); Peaslee v. Haberstro, 15 Blatchf, 472, 19 Fed. Cas. 71 (No. 10,884); Dwight v. Merritt (C. C.) 4 F. 614, 615; Middleton Paper Co. v. Paper Co. (C. C.) 19 F. 252, 253.

"'After careful consideration, however, I conclude that the provisions of section 911 only apply to writs and process issuing from the courts themselves, and not to notices given by the parties, which are not process of the court and not embraced within its terms, and hence that in any proceeding which may properly be instituted and proceeded with upon mere notice to the parties in interest, without process from the court itself, the requirements of section 911 have no application.'" Eley v. Gamble, 75 Fed. (2d) 171, 172, 173.

This Procedure Approved by Text Writers.

"Under the conformity act (Rev. Stat., sec. 914; U. S. Comp. Stat. 1901, p. 684) an action may be instituted by notice under sec. 6046 in a Federal Court in Virginia in accordance with the State practice." Burks Pleading & Practice, Second Edition, p. 226.

"Interesting questions sometimes arise as to what is process within the meaning of this federal statute. Thus, is notice of motion for judgment, a practice obtaining in Virginia and many other states, process in this sense, so that it must conform to the federal statutory requirements? Judge McDowell, in a well considered opinion that is believed to be sound, has answered this question in the negative. And the same has been held as to notice given by the parties of the commencement of a proceeding for the condemnation of land." Dobie on Federal Procedure, p. 592.

"Action may be instituted by such notice (under Vir-

ginia Code, section 6046) in a Federal Court in Virginia in accordance with State practice." 4 Cyc. of Fed. Procedure, sec. 1203.

"Process included in the phrase 'modes of proceeding' used in the Conformity Act, and in the statute requiring that all writs and processes issuing from the federal courts shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof, in its narrowest sense means the writs and mandates of the court under the seal of the court, and so does not include mere notices of the parties given by the parties." 6 Hughes Fed. Practice 106, sec. 3584.

Citing the following cases:

"In re: Condemnation Suits by United States (D. C. Tenn. 1916), 234 F. 443; Leas & McVitty v. Merriman (C. C. Va. 1904), 132 F. 510."

"Those (process) issuing from the Supreme Court must bear teste of Chief Justice of the United States, or, when that office is vacant, of the Associate Justice next in precedence; and those issuing from the District Court bear teste of the judge, or when that office is vacant, of the clerk thereof. They must be signed by the clerk of the court, from which they issue. In this connection 'process' means the writ and mandate under the seal of the court, and does not refer to notices given by the parties, which are not the court's process." 6 Hughes Fed. Practice 325, sec. 3787.

Citing the following cases:

"In re: Condemnation Suits by United States (D. C. Tenn. 1916), 234 F. 443, holding that as condemnation suits, under the state statute, may be instituted upon mere notice, such proceedings are valid though the notices are not under the seal of the court and signed by the clerk."

For Federal cases on subject, see Appendix, pages 22-30.

For State cases on subject, see Appendix, pages 30-35.

For discussion of petitioner's authority to sue, see Appendix, pages 19-21.

CONTINUANCE OF CASE AS TO U. M. GENTRY'S ADMINISTRATOR NO ERROR

Nine living directors and the personal representatives of two deceased directors were sued by notice of motion jointly and severally for a stock liability of $22,000.00. The case was continued as to U. M. Gentry's Administrator on a plea of insanity which was not pleaded by anyone else. This was objected to by petitioners. See first ground of motion to set aside verdict Record page 24 paragraph one and Assignment of Errors page 26 paragraph 3.

The propriety of this was essentially a question of Virginia practice. This action was permitted by Judge Luther B. Way, a Virginia Judge of great experience, and approved by the Circuit Court of Appeals for the Fourth Circuit.

No objection was made to dismissing the case as to W. Worth Smith, who had secured his discharge, in bankruptcy or continuing as to P. B. Porter, J. P. Donnally and H. W. Porter's Administrator, who had filed pleas of bankruptcy and had not been granted their discharges. Record p. 23, just below middle.

This question is disposed of by Judge Parker in the opinion of the Circuit Court of Appeals, Record page 72, by quoting sections 6047 and 6265 of the Code of Virginia. Section 6047 is here quoted with the most pertinent parts italicized:

> "A person entitled to obtain *judgment for money* on motion may, as to any, or the personal representatives of any person liable for such money, move severally against *each, or jointly against all, or jointly against any intermediate number;* and when notice of his motion is not served on all of those to whom it is directed, judgment may nevertheless be given against so many of those liable as shall appear to have been served with the notice, *but the judgment against such personal representative shall, in all cases, be several.* Such motions may be made from time to time until there is

judgment against every person liable, or his personal representative."

It will be observed that this section covers a notice of motion for money due, on contract, tort or otherwise. It provides for judgment against one or any intermediate number. It is also respectfully called to the Court's attention that this section requires the judgment to be *several* as to the *personal representative of a decedent.* Section 6265 of Virginia Code quoted in the opinion of the Circuit Court of Appeals (R. 73) permits judgment on joint contracts or joint and several contracts against any one or any intermediate number and permits the plaintiff to dismiss or proceed to judgment as to any so served. Numerous authorities sustaining this position could be added, but it is not believed that this Court will review a matter of local practice approved by the District Court and the Circuit Court of Appeals, and about which there appears to be no question.

Under this point it is said by the Circuit Court of Appeals that the liability of a stockholder in a national bank for an assessment levied by the Comptroller is contractual. Petitioners stated in their brief in the Circuit Court of Appeals that it was statutory. Counsel for respondents agreed with this statement, and therefore did not proceed to argue it although they had prepared a brief on the point to argue in the Circuit Court of Appeals in another case. The Circuit Court of Appeals referred to the cases of Richmond v. Irons, 121 U. S. 27 and Matteson v. Dent, 176 U. S. 521, but did not refer to McClaine v. Rankin, 197 U. S. 154 and subsequent cases holding the liability statutory. We submit, however, that, so far as this case is concerned, it is immaterial whether the liability was statutory or contractual.

LIABILITY OF JOINT ADVENTURERS OR PARTNERSHIP FOR STOCK ASSESSMENT

We do not dispute the statement that generally speaking the responsibility of share holders is individual and statutory, not contractual and joint, made on page 32 of Appellants' brief. We think the liability is always statutory and is always several except where the ownership is joint in which case the partnership or joint adventurers are necessarily jointly and severally liable for the stock which they jointly own.

The joint nature of the purchase and ownership of this stock was fully established by the evidence to the satisfaction of the trial court and also to the satisfaction of the Circuit Court of Appeals by the testimony of the defendants against whom the joint judgment was entered. See opinion of the Circuit Court of Appeals (R. 73 to 78). Also opinion of the trial Court (R. 58 to 62).

It has never been denied as far as we know that a partnership or joint adventure may purchase stock in a national bank. If they do they are of course jointly and severally liable for the stock assessment as they would be for taxes on the stock or any other debt of the joint adventure or partnership. This was expressly held in English v. Gamble (C. C. A. 8th) 26 Fed. (2d) 28, and also in this case by the Circuit Court of Appeals for the Fourth Circuit. This is a matter about which there is no difference of opinion in the different Circuits. See opinion of Circuit Court of Appeals in this case (R. 76 to 78).

COURT'S ACTION IN DIRECTING A VERDICT

In this case the defendants first moved for a directed verdict at the conclusion of the plaintiff's evidence and renewed their motion for a directed verdict at the conclusion of all of the evidence. See opinion of the Circuit Court of Appeals, Record page 71 and opinion of the trial Court, Record pages 57 to 58. The effect of a motion for a di-

rected verdict and nothing more by the defendants was a waiver of the jury so far as they were concerned. They did not try to waive the jury upon condition that the Judge should decide in their favor. Having asked for a directed verdict, which was a waiver of the jury they could not be heard to complain of the Court's action in directing the verdict for the plaintiff, if there is sufficient evidence to sustain such a verdict. Judge Parker of the Circuit Court of Appeals said in the opinion in this case, Record page 73:

> "Coming to the merits of the case, we note that at the conclusion of the testimony both sides moved for a directed verdict. It is well settled that this amounts to a waiver of jury trial and a consent that the trial judge decide the issues and direct a verdict accordingly; and in such case, upon exception to an adverse finding and direction, the only question is whether the verdict as directed is supported by substantial testimony. In other words, the verdict must stand unless the party against whom it has been directed was entitled to have it directed in his favor. Williams v. Vreeland, 250 U. S. 295; Sena v. American Turquoise Co., 220 U. S. 497, 501; Beutell v. Magone, 157 U. S. 154; Barringer v. Dinkler Hotels Co. (C. C. A. 4th) 61 Fed. (2d) 82, 83; Swift & Co. v. Columbia Ry. Gas & Electric Co. (C. C. A. 4th) 17 Fed. (2d) 46, 49; Lawton v. Carpenter (C. C. A. 4th) 195 Fed. 362. The only question left for our determination, therefore, is whether, upon the evidence, defendants were entitled to a directed verdict. We agree with the judge below that they were not."

We agree that some of the defendants sometimes testified that they individually bought an undivided one-eleventh interest in the stock but they all testified to facts which when proved established a joint adventure. See the summary by the trial Judge (R. 59 and 61). But the questions to and answers of L. P. Chisholm, the only real defendant in this case, on page 35 would establish a joint adventure. See also the testimony of L. P. Chisholm on page 38.

W. E. Crank, Commonwealth Attorney and one of the defendants, (R. 52) testified he "never expected to pay anything on the note except interest" referring to the joint note given for the purchase. He also testified on page 52, "no plan as to ultimately dividing any stock among the directors and issuing individual certificates . . . bought it for the purpose of reselling it." The manner of buying and holding the stock was well described by W. Worth Smith, Jr., State senator and a lawyer of experience on page 54 of the Record, as follows:

> "Mr. Donnally figured the liability for each on the note of one-eleventh and they were buying stock in proportion to their liability on the big note; he never felt he owned any of the stock . . . the purpose of taking all the stock in one block was to get the money and to sell the stock immediately and closed out the transaction as far as the Government was concerned; get all the money at one time and not wait until the stock could be sold to Tom, Dick and Harry throughout the county; during that time they were simply financing it with no intention on the part of anybody to increase their individual holdings and it was put in the name of J. P. Donnally, Trustee solely for the purpose of convenience in distribution among the prospective ultimate holders; while it was never discussed, it was his idea that any sales were to be off the whole block and Donnally was not to sell any individual's stock; the object of taking the stock in this way was not that the named persons would eventually become the owners, but the purpose was to distribute it through the sections; the eleven named persons were a sort of avenue of distribution of the stock; he had ten shares before and would not assume a liability of $60,000.00 to get a profit on ten shares."

As the petitioners have not argued either in their petition for certiorari or in the brief in the Circuit Court of Appeals their objections to the admissibility of evidence, we do not feel that we should further notice their objec-

tions. Their principal objection was to showing that the defendants whom the Court held were joint adventurers borrowed the entire purchase price of the stock on a joint note and that a joint judgment had been recovered against them on the note. The manner of raising the purchase money was so closely connected with the purchase of the stock that the priority of connecting the two is self evident.

Respectfully submitted,

MURRAY M. MCGUIRE,
JOHN S. EGGLESTON,
GEORGE GILMER,
Attorneys for Respondent.

APPENDIX

Virginia Code, Section 6046

"Remedy by motion after fifteen days' notice, in lieu of action at law; when notice to be returned to clerk's office; rules applicable to.—Any person entitled to maintain an action at law may, in lieu of such action at law, proceed by motion, before any court, which would have jurisdiction of such action, after not less than fifteen days' notice, which notice shall be in writing, signed by the plaintiff or his attorney, and shall be returned to the clerk's office of such court, within five days after service of same, and when so returned shall be forthwith filed and the date noted thereon, and shall be docketed on the return day thereof. But the notice shall not be sent out of the county or city in which the judgment is to be asked, except in those cases in which process can be so sent out under the provisions of section six thousand and fifty-five and six thousand and fifty-six. The return day of a notice under this section shall not be more than ninety days from its date, unless the commencement of the next succeeding term of court be more than ninety days from such date, in which case the return day may be some day of such term.

"The defendant may make the same defenses to the notices as to a declaration in any action at law, and in the same manner, or he may state his grounds of defense informally in writing, and in the latter event the parties shall be deemed to be at issue on the grounds stated without replication or other pleading on the part of the plaintiff. No plea in abatement under this section shall be received after the defendant has demurred, pleaded in bar or filed such statement of his grounds of defense. An action shall be deemed brought on the day on which such notice is executed, if such notice be subsequently returned to the clerk's office to which same is returnable within the time herein prescribed, and the execution thereof shall stop the

running of the statute of limitations on the claim mentioned therein.

"If the motion be upon an account, the plaintiff shall file with the notice an account, stating distinctly the several items of his claim, unless they be plainly described in the notice, and if the plaintiff file with such account an affidavit, such as is prescribed by section sixty-one hundred and thirty-three, on the part of the plaintiff, in an action of assumpsit, no plea in bar or defense to the merits shall be received on the part of the defendant, unless accompanied by such affidavit as is prescribed by the last mentioned section on the part of the defendant in an action of assumpsit. If such plea and affidavit be not filed by the defendant, the plaintiff shall, upon motion made in open court, be entitled to a judgment for the amount claimed in the affidavit filed with his notice, and no further proof of the plaintiff's claim shall be necessary. If such plea of defense and affidavit be filed and the affidavit admits that the plaintiff is entitled to recover from the defendant a sum certain less than that stated in the affidavit by the plaintiff, judgment may be taken by the plaintiff for the sum so admitted to be due, and the case be tried as to the residue.

"Upon any motion under this section the same rules shall apply, with reference to bills of particulars and grounds of defense, as are now provided by law in other actions or motions.

"In the event the return day of any notice given under the provision of this section, should happen to be a day of the term on which the court did not sit, or a day after the final adjournment of a term, such notice shall not be lost, but shall be deemed matured for hearing on the first day thereafter of the same term on which the court sits or the first day of the next regular term of the said court, as the case may be, and shall be docketed on that day by the clerk."

PETITIONERS' AUTHORITY

From page 21 to 24 are a group of Circuit and District Court decisions from New York and Wisconsin holding that under the practice of those two States attorneys could not sign process in a Federal Court to institute proceedings. But section 721 of the Judicial Code is held by the United States Courts in Virginia, Iowa and Tennessee including the Circuit Court of Appeals for the Fourth Circuit (Leas & McVitty v. Merriman, 132 Fed. 510, Virginia District Court In re: Condemnation Suits by the United States, 234 Fed. 43, Tennessee District Court, Wile v. Cohn, 63 F. 159, Circuit Court Iowa and Eley v. Gamble, 75 F. (2d) 171 (C. C. A. 4th Circuit) not to apply to a notice of motion for judgment in these States which is not process.

Many State Courts have held that State Constitutional provisions about the commencement and conclusion of process do not apply to notice of motion similar to that used in Virginia.

Hammond-Chandler Lumber Co. v. Industrial Commission (1918) 158 N. W. 292, 294, 163 Wis. 596.

Comet Consolidated Min. Co. v. Frost (1890) 25 Pac. Rep. 506, 507, 15 Colo. 310.

Lane v. Ball (1916) 160 Pac. 144, 148, 149, 83 Ore. 404.

State Chilean County v. Superior Ct., 253 Pac. 115, 119, 142 Wash. 270 (1927).

Herndon v. Wakefield-Moore Realty Co., 79 So. 318, 319, 143 La. 724 (1918).

McKenna v. Cooper, 101 Pac. 662, 663, 79 Kan. 847 (1909).

Brooks v. Nevada Nickel Syndicate, 53 Pac. 597, 599, 24 Nev. 264 (1898).

No. Pac. Ry. Co. v. Jurgenson, 141 N. W. 70, 71, 25 N. D. 14 (1913).

Hanna v. Russell, 12 Minn. Rep. 43, 45 (1882).

Burns v. Pittsburg Mortgage Inv. Co., 231 Pac. 887, 889, 105 Okla. 150 (1924).

Gilmer v. Bird, 15 Fla. Rep. 410, 421, 422, 423 (1875).

Nichols v. Burlington & Louisa County Plank Road Co., 5 Iowa Rep. (4 Greene) 42, 43 (1853).

The two United States Supreme Court cases cited on page 25 of Petitioners' brief, Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931, 932 and Boswell v. Otis, 9 How. 336, 348, 13 L. Ed. 164, 169 do not have the remotest bearing on the subject. For instance in Boswell v. Otis, there was an attachment against a non-resident. The quotation, if taken to mean that jurisdiction could only be acquired in one of two modes would prevent a Court from acquiring jurisdiction from voluntary appearance.

ERRONEOUS OR MISLEADING STATEMENTS OF LAW

No authority is cited for the statement on page 26 that the District Court could only acquire jurisdiction of the defendant by a process issued by the District Court.

There is a quotation from Hughes Federal Procedure (2d Ed.) on page 26. The Court's attention is respectfully called to the fact that this was a one volume work in 1913 issued by the West Publishing Company as one of its horn book series. This small volume only about one inch thick could not cover all the matters, but see Hughes 1931 Federal Practice, section 3584 where a statement to the contrary is found.

The quotation from Hughes 6th edition, section 3584 found on page 27 is incomplete, in that it omits the first part of that section which reads as follows:

> "'Process,' included in the phrase 'modes of proceeding' used in the Conformity Act, and in the statute requiring that all writs and processes issuing from the federal courts shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof, in its narrowest sense means the writs and mandates of the court under the seal of the court, *and so does not include mere notices of the parties given by the parties.* No form of process is provided for the courts of the United States by any act of Congress now in force." Hughes Federal Practice Jurisdiction & Procedure, sec. 3584, p. 106. (Italics ours.)

We thoroughly agree with the quotation from the Hot Springs Co. v. Schreck, 131 Va. 581, which says that the notice "takes the place of the writ." It will be observed that this is a holding that the notice is not a writ. No authority is cited for the statement at the bottom of page 27 that the case of Eley v. Gamble, 75 Fed. (2d) 171 is in conflict with the decision of other Circuit Courts of Appeal. The brief does not refer to the other Circuit Courts of Appeal anywhere by name and citation, and we have been unable to find them.

The case of Eley v. Gamble, 75 F. (2d) 171, holds that it is not in conflict with the District and Circuit Court decisions cited by petitioner from Wisconsin and New York.

Section 503, Title 28, does not forbid the marshal to serve other papers.

ERRONEOUS STATEMENT OF FACTS IN PETITIONERS' BRIEF

We wish to take issue with the statement on page 38 of defendants' brief:

> "None of the other defendants or parties to the agreement to purchase the stock testified, and the Receiver offered no evidence of any other person who was present and made the agreement of each to buy."

We first put on L. P. Chisholm, who is for practical purposes, the only defendant, and one of the other Directors, and proved our case by them, except for formal matters, such as the assessment by the Comptroller, appointment of Receiver, etc., which were proved by the Receiver. In the case all of the living Directors who bought the stock were examined. The only two that were not, were made parties defendant through their personal representatives. There was naturally no evidence of what took place at the Directors meeting, other than the evidence of the living Directors. We deny the further statement on page 38 that J. P. Donnally's report to the Comptroller's office of the stockholders of the Bank "showed the shares of stock

which each of the defendants had purchased was an undivided one-eleventh interest."

The record shows on page 43 that J. P. Donnally testified:

"Witness further testified that in July of the years 1931 and 1932, he filed in the Comptroller's office, as required by statute, a report of the stockholders of the Bank, which showed the 220 shares in his name as Trustee and no more."

This is very different from the quotation on page 38 of Petitioners' brief.

DECISIONS

Federal Cases

Prior to 1904 there were four circuit court decisions and one District court decision to the effect that process must conform to section 721 of the United States Code. The latest of these appear to be 50 Fed. Since the decision of Judge McDowell in Leas & McVitty v. Merriman, 132 Fed. 510, these old cases do not appear to have been applied to private notices.

In 1904 this question was raised before Judge McDowell, a very distinguished judge of the Western District of Virginia. Judge McDowell handed down a very carefully considered opinion, September 22nd, 1904, which has been since followed and approved and has never so far as we can learn, been even criticized by any court. As the entire opinion is devoted exclusively to the one point before us, it is very hard to do much less than copy the decision in this case. There was a proceeding by notice of motion under section 3211 of the Code of 1887, now section 6046:

". . . Upon the calling of the case the defendant's counsel moved that the motion be dismissed on the ground that the notice was not under the seal of the court and not signed by the clerk of the court. The argument is based on section 911, Rev. St. (U. S. Comp. St. 1901, p. 683) (section 721 U. S. Code):

"'All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from . . . a Circuit Court shall bear teste of the Chief Justice. . . .'

"The question thus raised is in this state of much practical importance. Not only are there many such motion cases, but by section 2732 (now 5461) of the Code of Virginia of 1887 actions of ejectment may be instituted only by a notice given the defendant, to which is attached a copy of the declaration, advising him when and where the declaration will be filed. The practice under this statute has always been that the plaintiff's attorney prepares, signs, and has served the notice, whether the action is brought in the state courts or in the federal courts in this state. There is no rule of this court bearing on the question. Were it not for some decisions to be adverted to later I should feel justified in overruling this motion without discussing the question. The language used in section 911 (now 721), Rev. St., seems to me to show clearly that it has no relation to such a case as is here presented. However, because of the decision above mentioned, it is perhaps advisable to enter upon a discussion of the question." . . .

Here Judge McDowell refers to the older cases upon the subject.

"I have reached the conclusion that section 911 does not apply here and for the following reasons:

"(1) On its face this statute applies only to writs and processes issuing from the federal courts. In no sense do the notices we have under consideration 'issue' from the court. The ground for the motion by defendant in the case at bar is highly technical, and could properly be met by a somewhat technical reason for overruling it. But I am not satisfied that this reason is only technical. If the language of this statute can be rightly held to apply to the notices here in question, it could also be held to apply to all the various notices

given in the course of litigation in the federal courts. The statute is, most properly, not confined to documents which are used merely to institute a litigation.

"(2) I think section 911 (721), Rev. St. (U. S. Comp. St. 1901, p. 683), means no more than that when a writ or process issues from a federal court it must be signed by the clerk, and shall be authenticated in the manner therein set out. It is not an ordinance to the effect that no action or proceedings in a federal court shall be instituted except by the issue of process, signed by the clerk, duly sealed, etc.

"(3) Notices in ejectment under section 2732, Code Va. 1887, and notices of motion for judgment under section 3211 are not, as it seems to me, 'processes.' To my mind, the word 'process,' as used in Rev. St. Sec. 911 (721), means an order of court, although it may be issued by the clerk. The summons in a common-law action, which is, I think, a 'process,' in the name of the court commands the sheriff or marshal to summon the defendant, etc. Johnston's Forms, p. 1. The writs of scire facias, fieri facias, habeas corpus, subpoenas for witnesses, subpoenas duces tecum, writs of certiorari, supersedeas, attachments, and of venire facias are all commands or orders of court that something be done. In equity the writ of subpoena, and in criminal cases the bench warrant, command that something be done. Now, the notices under the Code are are in no sense commands or orders of court. They are mere notices that the plaintiff will on some specified rule day file the declaration, or make a motion in court. They sometimes are, and may always be, prepared, signed, and issued by the plaintiff in person. No rule of practice requires that an attorney shall sign or issue them. They do, it is true, subserve the purposes of processes. But they are not technically processes, and are not necessarily embraced within that term as used in section 911 (721).

"In several of the states a summons in an action may be issued by the plaintiff's attorney. See 19 Am. & Eng.

Ency. (1st Ed.) p. 222, notes and cases cited supra. And in at least the majority of such cases it is held that a summons is not a process. This conclusion is based on the fact that in such states the summons is not issued by the court, and is not an order of court. If such reasoning have any soundness, it applies much more forcibly to the notices we are considering.

"In Whitney v. Blackburn, 17 Or. 564, 21 Pac. 874, 11 Am. St Rep. 857, it is said:

'Properly speaking, a summons is only a process when issued from the office of a court of justice requiring the person to whom it is addressed to attend the court for the purpose therein stated. Under our Code the summons is a process to commence a civil action. But technically, such a summons is not a "process," but is more in the nature of a mere notice informing the defendant that an action has been commenced against him, and that he is required to answer the complaint therein within a specified time. In view of this distinction, such notice cannot be considered process in the sense in which that word is used in the books.'

"(4) If we read into section 911 (721), Rev. St., a requirement that notices in ejectment and of motions for judgment are to be treated as processes to be issued by the clerk under seal, we have created a repugnance between sections 911 (721) and 914 (724), Rev. St. This is to be avoided. If one of two reasonable readings of the statute law creates, and the other avoids, a repugnance, the latter should be adopted.

"(5) While the language above quoted from Shepard v. Adams, 168 U. S. 618, 824, 18 Sup. Ct. 214, 216, 42 L. Ed. 602, seems prima facie to indicate that a paper serving the purpose of process from the federal court must always conform to section 911 (721), Rev. St., still the entire opinion is somewhat in confirmation of the opposite conclusion. It seems to give much weight to section 914 (724), Rev. St., and

the inference is that, where there is no rule of the federal court on the subject a state statute authorizing a summons to be issued by plaintiff's attorney would control in the federal court. The prototype of section 911 (721) was enacted in 1789 (Act Sept. 29, 1789, c. 21; 1 Stat. 93. See, also, Act May 8, 1792, c. 36; 1 Stat. 276); the conformity act (section 914 (724)) at a much later date (Act June 1, 1872, c. 255, 17 Stat. 197). The purpose of this later statute was to secure conformity in civil law causes, subject to a reasonable discretion in the federal courts, in matters of practice, pleading, and 'forms and modes of proceeding.' Where the state statute authorizes the plaintiff or the plaintiff's attorney to issue not a summons, but a notice, as a method of instituting a litigation, reasonably full effect is denied the conformity statute if we hark back to act of 1789 for authority for saying that such state statute does not govern in common-law civil causes in the federal courts of such state, in the absence of any rule of court on the subject.

"The motion of defendant is overruled." Leas & McVitty v. Merriman, 132 Fed. 510.

This case has never been overruled or disapproved by any court so far as we can find.

It was followed in Schofield v. Palmer, 134 Fed. 753 and In Re: Condemnation Suits, 234 Fed. 443. Cited with approval In Re: Pieris Irr. Dist. v. Turnbull, 215 Fed. 562 and In Re: Simon, 297 Fed. 942.

The notice of motion statute in Virginia has been construed on several occasions by the courts of this District and by the Circuit Court of Appeals of this District. See New River Mineral Company v. Roanoke Coal & Coke Co., 49 C. C. A. 78, 110 Fed. 343. Schoefield v. Palmer, 134 Fed. 753. Shugart v. Crews, 171 C. C. A. 72, 260 Fed. 36.

This decision of Judge McDowell has been relied on by the bench and bar in the State of Virginia for thirty years. To question it at this time would be to throw doubt upon

the validity of probably more than fifty per cent of the recent judgments by default in the Federal Courts of Virginia.

It would also in effect so far as Virginia is concerned nullify the Conformity Act, section 724, because the lawyers of Virginia are familiar with the procedure by notice of motion and habitually use it. The fundamental purpose of 724 is to permit lawyers in the State to use the procedure with which they are familiar.

In a number of condemnation proceedings in the Eastern District of Tennessee under section 724, they gave notice as provided by the state practice. Objection was made that they were void because process was not issued signed by the Clerk and under the seal of the court.

> "In several proceedings instituted by the United States and now pending in this court for condemnation of lands under the provisions of the Weeks Law of March 1, 1911, c. 186, 36 Stat. 961 (Comp. St. 1913, sec. 5174-5187), the United States Attorney and various counsel representing claimants to the land have informally requested the opinion of the court as to the validity of the proceedings, arising out of a doubt which has been suggested as the jurisdiction of the court by reason of the fact that no summons have been issued and served upon the owners of the land, but they have been brought before the court, if at all, by mere service of notice and publication as to nonresidents, in accordance with the provisions of the general statutes of Tennessee in reference to condemnation proceedings.
>
> "(1) The Act of August 1, 1888, c. 728, 25 St. 357, authorizing the condemnation of land by the United States for public uses by condemnation under judicial process in proceedings in the Circuit or District Courts of the district wherein such real estate is located, provided, in section 2, that:
>
> 'The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act

shall conform, as near as may be to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of the court to the contrary notwithstanding.'

"This provision as to conformity to the State practice is, it is to be noted, in substantially the same terms as the provisions of the general conformity statute, embodied in section 914 of the Revised Statutes (Comp. St. 1913, sec. 1537).

"The general statute of Tennessee in reference to the condemnation of land for railroads and other works of internal improvement, provide that the party seeking to appropriate such land shall file a petition therefor in the circuit court of the county in which the land lies (Tenn. Code 1858, sec. 1326; Shan. sec. 1845); that notice of this petition shall be given to the owner of the land, or if a nonresident of the county, to his agent, at least five days before its presentation (Code 1858, sec. 1327; Shan. sec. 1846); that if the owner is a nonresident of the state or unknown, notice shall be given by publication, as provided in the Code in similar cases in chancery (Code, sec. 1328; Shan. sec. 1847); and that 'all parties having any interest in any way in such land may be made defendants, and the proceedings will only cover and affect the interest of those who are actually made parties' (Code, sec. 1328; Shan. sec. 1848). This statute makes no provision for bringing the owners of the land before the court in any other way than by notice and publication, as above set forth, and does not provide for the issuance of process against them in the ordinary sense, such proceedings being under the State law an exception, by necessary inference, to the general statutory provision that all civil actions at law in courts of record, except as otherwise provided, shall be commenced by summons. Tenn. Code, Sec. 2813; Shan. sec. 4318. Thus in Camp v. Railroad, 11 Lea (Tenn.) 705, 706, it was held that condemnation proceedings based alone upon the statutory notice, without sum-

mons, were valid, and that the general Code provisions as to pleadings in actions at law did not apply to such statutory proceedings.

"The doubt which has been suggested as to the validity of these proceedings arises from the fact that section 911 (721) of the Revised Statutes (Comp. St. 1913, sec. 1534) provides that 'all writs and process issued from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof;' the suggestion being that under this provision these proceedings should have been commenced by summons to the owners of the land, issued under the seal of the court and signed by the clerk.

"I think it entirely clear, both upon principle and under authorities, that in any original suit in a Federal court which must be commenced by a summons or other process of the court itself, such process must be signed by the clerk and issued under the seal of the court, to be valid, regardless of any different provision as to the form of a summons in the State courts, the general conformity statute not operating to waive this specific requirement as to the process in the Federal courts embodied in section 911 (721) of the Revised Statutes. Martin v. Criscuola, 10 Blatchf. 211, 16 Fed. Cas. 892; Peaslee v. Haberstro, 15 Blatchf. 472, 19 Fed. Cas. 71; Dwight v. Merritt (C. C.) 4 Fed. 614, 615; Middleton Paper Co. v. Paper Co. (C. C.) 19 Fed. 252, 253.

"After careful consideration, however, I conclude that the provisions of section 911 (721) only apply to writs and process issuing from the courts themselves, and not to notices given by the parties, which are not process of the court and not embraced within its terms, and hence that in any proceeding which may be properly instituted and proceeded with upon mere notice to the parties in interest, without process from the court itself, the requirements of section 911 (721) have no application. This is in accordance with the principle of Leas v. Merriman (C. C.) 132 Fed. 510, in which it was held that the provisions of sec. 911 (721)

did not apply to a notice given under the Virginia Code authorizing a judgment on a contract to be obtained on motion after notice to the defendant and the practice thereunder by which notice was served on the defendant by the plaintiff or his attorney, such notice not being a process from the court, and that under the general conformity statute an action might be instituted by such notice in the Federal court in Virginia in accordance with the State practice." In Re, Condemnation Suits by United States, Eastern District of Tenn. March 30, 1916; 234 Fed. 443.

"Process—What Constitutes—Notice of the Garnishment. Rev. St. sec. 915 gives plaintiff, in common law causes in the United States Circuit Court remedies by attachment or other process against the defendant's property, similar to those provided by the state statutes. Code Iowa sec. 2962, provides that the clerk shall issue the writ of attachment. Sec. 2967 provides that property of the defendant held by a third person may be attached by giving the latter notice of attachment. Sec. 2975 as amended by Laws 18th General Assembly, 58, provides that garnishment is effected by informing the supposed debtor that he is attached as garnishee, and leaving written notice not to pay any sum due, or deliver the property to defendant, etc., there is no provision in the Revised Statutes or Iowa Code requiring either of such notices to proceed from the clerk. *Held,* that a notice to the garnishee is not a 'process' within Rev. St. sec. 911, relating to process, and that such notice in actions in the United States Circuit Court in Iowa is properly signed by the marshal, and need not bear the seal of such court or the teste of the chief justice of the United States." Wile v. Cohn (1894), 63 Fed. Rep. 759 (Syllabus) (Cir. Ct. Iowa, Sept. 17, 1894).

State Cases

There are numerous State decisions that statutory and constitutional provisions which require process to be

signed and sealed by the Clerk or issued in the name of the State such as U. S. Code, sec. 721 and Va. Constitution, sec. 106 and have no application whatever to citations or notices given by parties or their attorneys similar to those given under section 6046 of Virginia Code. A few of the State decisions quoted from are as follows:

> "A summons is not a process—it is a mere statutory notice. Rahn v. Cunnison, 12 Wis. 528. The summons in this case was regular, in every way except for not being signed by Wisconsin attorneys with their address specified." Hammond-Chandler Lumber Co. v. Industrial Commission (1916) 158 N. W. 292, 294, 163 Wis. 596.

> "As to the first point raised that the summons is such a process as must be issued in the name of the people of the State of Colorado, we are strongly inclined to follow the conclusion of the supreme court of Florida in Gilmer v. Byrd, 15 Fla. 411. In this case the identical question here presented is discussed at some length—that is, that the summons, as authorized by the Code is a 'process' within the meaning of the constitutional provisions which require the style of all process to be the 'State of Florida;' that the summons had no style; that this was essential to the validity of the judgment, there having been no appearance. And the Court said: 'But is a notice given by an attorney of the institution of a suit in a form similar to a summons but not issuing out of a court, a "process" within the meaning of the constitutional?' Baron Comyn in giving the definition of the term 'process' says it imports the writs which issue out of any court to bring the party to answer, or for doing execution. There is no definition of 'process' given by any accepted authority which implies that any writ or method by which a suit is commenced is necessarily 'process.' A party is entitled to notice and to a hearing under the constitution before he can be affected but it is nowhere declared or required that that notice shall be only a writ issuing out of a court." Porter v. Vandercook, 11 Wis. 70, it

was held that "the summons provided for by the Code is not a 'writ' or 'process' within the meaning of the constitution, art. 7, sec. 17, and need not be in the 'name of Wisconsin' nor tested in the name of the presiding judge, nor sealed with the seal of the court. In Hanna v. Russell, 12 Minn. 80 (Gil. 43) the Court said: 'But we think a 'summons' is not a 'process' within the meaning of sec. 14, art. 6 of our State Constitution. It is merely a notice given by plaintiff's attorney to the defendant that proceedings have been instituted and judgment will be taken against him if he fails to defend. This notice is not issued out of or under the seal of the court, or by authority of the court or any judicial officer. The fact that the court acquires jurisdiction by its service does not prove it 'process' for it is competent for the legislature to provide that the court shall acquire jurisdiction by the service of the complainant without a summons, or in any other manner by which the defendant may be notified that proceedings have been instituted against him.' Bailey v. Williams, 6 Or. 71, it was held that 'a summons used to bring a defendant into the circuit court is not a 'process' and need not run in the name of the state.' In Nichols v. Plank Road Co., 4 G. Greene, 44, it was held that 'the notice provided by the Code is not a 'process' and need not be in the style of the 'State of Iowa.' This seems to be the generally accepted conclusion of all courts having a similar Code practice and a similar provision in the constitution, and is, in our judgment a satisfactory determination of this question." Comet Consolidated Min. Co. v. Frost (1890) 25 Pac. Rep. 506, 507, 15 Colo. 310.

"A summons issued by the plaintiff or his attorney in an action instituted in a court of record in Oregon is not a 'process' within the meaning of that word as used in our Code. L. O. L. sec. 1368; Bailey v. Williams, 6 Or. 71; Whitney v. Blackburn, 1 Or. 564, 21 Pac. 874, 11 Am. St. Rep. 857, 862.

"The cases thus relied upon are not controlling in Oregon where a summons issued in an action instituted in

a court of record is not process, nor more than a mere notice to the defendant upon whom it is served." Lane v. Ball (1916) 160 Pac. 144, 148, 149, 83 Or. 404 (Sup. Ct. Ore. 1916).

"Two other questions are urged by respondents (a) that the Court did not acquire jurisdiction; and (b) that the notice was insufficient.

"As to the first it was urged that since the notice to respondents did not run in the name of the State of Washington, and that by Article 4, sec. 27 of the State Constitution, all process is required to be in the name of the State of Washington the notice was ineffectual to give jurisdiction. An elaborate arrangement on this point is pressed upon us to show that the notice herein is process within the meaning of the Constitution. But we think it unnecessary to enter into a review of the question, since we have heretofore held that a summons in a civil action is not process, and we think the notice given herein stands on no higher plane. Wagnitz v. Ritter, 31 Wash. 343, 71 Pac. 1035; Spokane Merchants Assn. v. Acord, 99 Wash. 674, 170 Pac. 329, 6 A. L. R. 835; St. ex rel. Hazen v. Superior Court (Wash.) 247 Pac. 942." State Chilean County v. Superior Ct., 253 Pac. 115, 119, 142 Wash. 270 (Sup. Ct. Wash. 1927).

"Besides, citation is not 'process' within the intendment of said article of the Constitution. Bludworth v. Sompeyrac, 3 Mart. (O. S.) 719." Herndon v. Wakefield Moore Realty Co., 79 So. 318, 319 (Sup. Ct. La. 1918) 143 La. 724.

Note.—This was the commencement of a condemnation proceeding where it was claimed the citation did not conform to the requirements for process.

"In some states the original summons to the defendant in an action is a mere notice by the plaintiff's attorney; and hence is not process in the sense of constitutional or statutory provisions prescribing the style and requisites of process.

"But we think a summons is not process within the meaning of section 17, art. 3, of our State Constitution. It is merely a notice given by the plaintiff's attorney to the defendant that proceedings have been instituted, and judgment will be taken against him if he fails to defend. This notice is not issued out of or under the seal of the court, or by the authority of the court, or any judicial officer. The fact that the court acquires jurisdiction by its service does not prove its process, for it is competent for the Legislature to provide that the court shall acquire jurisdiction by the service of the complaint without a summons, or in any other manner by which the defendant may be notified that proceedings have been instituted against him. 'Process, in a large acceptation, is nearly synonymous with proceedings, and means the entire proceedings in an action from the beginning to the end. In a stricter sense it is applied to the several judicial writs issued in an action. 7 Comyn's Dig. 120; 3 Black. Com. 279 et seq.; Bouvier's Law Dic. In this last sense it is manifestly used in the Constitution and, when used in this sense, we believe it only applies to judicial instruments issued by a court or other competent jurisdiction and returnable to the same.' Hanna et al. v. Russell et al., 12 Minn. 80 (Gil. 43). The meaning of the Constitution of Illinois, which provides that all process shall run in the name of 'The People of the state of Illinois,' is thus explained. 'This object is manifest. It was to provide a name or title by which the sovereign power of the state should be designated. In England the king is supposed to be the fountain of justice and the source of power, and that sovereign power is there designated by his name and title. In Kentucky, and some of the other states, it is the 'commonwealth,' in Missouri and some others it is the 'State.' Here it is the 'People,' etc. Where, by the law of England, whence we have mainly borrowed our system of jurisprudence, writs or process are issued, or other proceedings are had expressly in the name of the king, here they should run in the name of

'The People.' The latter is to be used instead of the former. The meaning is not that everything shall be done expressly in the name of 'The People' but that nothing shall be done in any other name. Whenever the name of the sovereign power is invoked or expressed, that shall be its designation.' Curry v. Hinman, 11 Ill. 420. See, also, Leas & M'Vitty v. Merriman (C. C.) 132 Fed. 510; Gilmer v. Bird, 15 Fla. 410; William Tweed v. Horace Metcalf, 4 Mich. 579; Case Mfg. Co. v. Perkins, 106 Mich. 349, 64 N. W. 201; Plano Mfg. Co. v. Kaufert, 86 Minn. 13, 89 N. W. 1124; Brooks v. Nickel Syndicate, 24 Nev. 311, 53 Pac. 597; Bailey v. Williams, 6 Or. 71; Town of Davis v. Davis, 40 W. Va. 464, 21 S. E. 906; Porter v. Vandercook and others, 11 Wis. 70.'' McKenna v. Cooper, 101 Pac. 662, 663, 79 Kan. 847 (Sup. Ct. Kan. 1909).

''In this case the identical question here presented is discussed at some length—that is, 'that the summons, as authorized by the Code, is a 'process,' within the meaning of the constitutional provisions which require the style of all process to be, the 'State of Florida;' that the summons had no such style; that this was essential to the validity of the judgment, there having been no appearance,' and the court said: 'But is a notice given by an attorney of the institution of a suit, in a form similar to a summons, but not issuing out of a court, a 'process' within the meaning of the constitution? Baron Comyn, in giving the definition of the term 'process' says it imports the writs which issue out of any court to bring the party to answer, or for doing execution. There is no definition of 'process,' given by any accepted authority, which implies that any writ or method by which a suit is commenced is necessarily 'process.' A party is entitled to notice and to a hearing, under the constitution, before he can be affected, but it nowhere declared or required that the notice shall be only a writ issuing out of a court. Mining Co. v. Frost, 25 Pac. 506; Hanna v. Russell, 12 Minn. 80 (Gil. 43); Bailey v. Wil-

liams, 6 Or. 71; Nichols v. Plank-Road Co., 4 G. Greene, 44." Brooks v. Nevada Nickel Syndicate (1898) 53 Pac. 597, 599 (Sup. Ct. Nev. 1898) 24 Nev. 264.

"As was stated at the outset, this summons was signed by the attorney, as permitted by the statute, and thereby F. C. Erdman was given notice of the pendency of the suit. The notice accomplished its purpose, and brought the right man into court, who moved to quash it. There is no question concerning the right to amend a writ because a summons signed by an attorney is not a process, but a notice under the code, or a proceeding, as perhaps it might be more accurately termed, whereby the person who is named as a defendant is brought into court to defend the action. Mining Co. v. Frost, 5 Colo. 310, 25 Pac. 506." Erdman et al. v. Hardesty (1900) 60 Pac. 360, 361, 14 Colo. App. 395 (Sup. Ct. Colo. 1900).

"Writs are issued by the court through the clerk. Orders to show cause, under our practice, are signed by the judge. This order was signed by the judge. The practice in this state has long been established, and justifies the initiations of the proceeding through an order to show cause of the character of the one here involved. Such orders to show cause have been issued repeatedly by this court in various special proceedings, and have, so far as we are aware, never run in the name or style of the state of North Dakota. When writs have been issued, they have been issued by the clerk upon the order of the court; but orders to show cause have invariably been signed by a member of the court. It is true the order to show cause often contains some of the same provisions found in an alternative writ, but ordinarily an order to show cause is only another name for a notice and another method of submitting a motion; and section 7825, supra, clearly contemplates the application being made upon notice, when a peremptory writ is sought in the first instance. Such notice may be given by means of the simple notice signed by counsel, or through the agency of an order to show cause, issued by the court or a judge.

This is a combined notice and motion.. The works on the subject all seem to contemplate application for the writ, either by notice or by order to show cause, and none of the approved forms of an order to show cause that we find contain the greeting which respondent contends is essential to jurisdiction. See the title 'Writ of Prohibition,' 14 Enc. of Forms, 987; Writ of Mandamus, 13 Enc. of Forms, 767, 13 Enc. of Pl. & Pr. 767." No. Pac. Ry. Co. v. Jurgenson (1913) 141 N. W. 70, 71, 25 N. D. 14 (Sup. Ct. N. D. 1913).

"It is contended the published order for constructive process is void because it did not run in the name of the state of Florida.

"Section 37 of article 5 of the Constitution, providing that, 'The style of all process shall be the State of Florida' and section 4230 (2590). Compiled General Laws of Florida 1927, providing that, 'All process shall run in the name of the State of Florida,' have reference to 'process' as used in the restricted sense, and have reference only to that character of process which under the common law would run in the name of the king, and have no application to statutes providing for constructive service in chancery. Burns v. Pittsburg Mortg. Inv. Co., 105 Okl. 150, 231 Pac. 887; McKenna v. Cooper, 79 Kan. 847, 101 Pac. 662; Herndon v. Wakefield-Moore Realty Co., 143 La. 724, 79 So. 318; Curry v. Hinman, 11 Ill. 420; In re Abraham Bininger, 7 Blatchf. 262, text 274 (2d Cir.) Gilmer v. Bird, 15 Fla. 410; 20 Ency. Pl. & Pr. 1116." Gautier Properties v. Fla. Biscayne Trust Co. (1930) 129 So. 848, 849.

"Again, it is contended that both the Missouri and Kansas divorces are void because the publication notices did not run in the name of the state. The same contention was made in McKenna v. Cooper, 79 Kan. 847, 101 Pac. 662, but not sustained. That decision is adhered to. The same rule appears to prevail in Missouri. Hansford v. Hansford, 34 Mo. App. 262. See also, Doan et al. v. Boley et al., 38 Mo. 449." Gordon v. Munn (1912), 125 Pac. 1, 3, 87 Kan. 642, Ann. Ca. 914.

"But we think a summons is not process within the mean-

ing of section 14, article 6 of our state constitution. It is merely a notice given by the plaintiff's attorney to the defendant that proceedings have been instituted and judgment will be taken against him if he fails to defend. This notice is not issued out of or under the seal of the court, or by the authority of the court or any judicial officer. The fact that the court acquires jurisdiction by its service does not prove it *process,* for it is competent for the legislature to provide that the court shall acquire jurisdiction by the service of the complaint without a summons, or in any other manner by which the defendant may be notified that proceedings have been instituted against him. 'Process,' in a large acceptation, is nearly synonymous with 'proceedings,' and means the entire proceedings in an action from the beginning to the end. In a stricter sense it is applied to the several judicial writs issued in an action. 7 Comyn, Dig. 120; 3 Bl. Comm. 279 et seq.; Bouvier, Law Dict. In this last sense it is manifestly used in the constitution, and when used in this sense we believe it only applies to judicial instruments issued by a court or other competent jurisdiction and returnable to the same. A summons, in our practice, therefore, we think, is not, in a strict or proper sense, or in the sense in which the word is used in the constitution, process." Hanna v. Russell, 12 Minn. Rep. 43, 45 (1882).

"It is further contended that the notice is void for the reason that it does not run in the name of the state of Oklahoma. Section 19, art. 7, of the Constitution provides that 'The style of all writs and processes shall be "The State of Oklahoma." Section 862, Comp. Laws 1921, provides: "The style of all process shall be 'The State of Oklahoma,' " etc. But manifestly, process as used in the Constitution and statute is in the restricted sense, and has reference only to that character of process which under the common law would run in the name of the king. 20 Ency. Pl. & Pr.; McKenna et ux. v. Cooper, 79 Kan. 847, 101 P. 662. The contention that the judgment is void for the reason that the de-

fendant was a resident of the state is not available in this proceeding. It is to be noted that the motion was not filed until more than three years after the judgment was rendered. Under such circumstances, the motion to vacate cannot be supported by evidence outside of the record. That is, the judgment was not void unless its invalidity appeared from the record. Pettis v. Johnston, 78 Okl. 277, 190 P. 681; Edwards v. Smith et al., 42 Okl. 544, 142 P. 302; E. R. Thomas Motor Car Co. v. Robb, 86 Okl. 266, 208 P. 783." Burns v. Pittsburg Mortgage Inv. Co. (1924) 231 Pac. 887, 889, 105 Okla. 150.

"Section 9 of the Declaration of Rights, contained in the Constitution of this State, provides that no person, shall be deprived of life, liberty or property without due process of law. Section 2 of Article 6 of the Constitution provides that 'the style of all process shall be "The State of Florida." The term, process, as used in these two sections, has not the same signification. In the first it is used in a large and comprehensive sense. In the second it is used in its most restricted and limited sense. Says Baron Comyn, "Process, in a large acceptance, comprehends the whole proceeding after the original and before judgment, but generally it imports the writs which issue out of any court to bring the party to answer, or for doing execution and all process out of the King's courts, ought to be in the name of the King. It is called Process because it proceeds or goes out upon former matter, either original or judicial."' . . .

"This clause does not prohibit the Legislature from establishing a general rule of practice by which notice of the institution of an action may be given by an attorney or party. It has never received such a construction by the courts. Where such an enactment is general and applies to all actions and to all individuals, as is the case of the Code, such notice by an attorney is in conformity to the law of the land, and a judgment depriving a party of his property after such notice is, in contemplation of law, a deprivation by due

process of law. Whether the notice given by the attorney be process or not, it is, for the reasons given, within the power of the Legislature, so far as this clause is a limitation, to authorize notice to be given in this manner. . . .

"But is a notice given by an attorney of the institution of a suit in a form similar to a summons, but not issuing out of a court, a process within the meaning of the Constitution? Baron Comyn, in giving the definition of the term process, says it imports the *writs which issue out of any court* to bring the party to answer or for doing execution. There is no definition of process given by any accepted authority which implies that any writ or method by which a suit is commenced is necessarily process. A party is entitled to notice and to a hearing under the Constitution before he can be effected, but it is nowhere declared or required that that notice shall be only *a writ issuing out of a court.*

"In the States in which has existed a Code similar to the one under which this action was brought, we find the courts of last resort holding that such notice or summons need not be entitled or styled in the name of the State, although the constitutional requirement is substantially the same as ours in regulating the style of process. 12 Wis. 529; 4 Iowa 43; 4 Mich. 588; 3 Penn. 99; 12 Min. 86." Gilmer v. Bird, 15 Fla. Rep. 410, 421, 422, 423 (1875).

"It is objected that the court refused to dismiss the proceedings on the ground of defective notice. The first defect urged is that the notice does not run in the name of the state of Iowa, as required by the Constitution. This court has decided in former cases that the notice provided by the Code is not a 'process,' as contemplated by the Constitution, and that it need not be in 'the style' of 'the State of Iowa.' " Nichols v. Burlington and Louisa County Plank Road Co. (1853) 5 Iowa Rep. (4 Greene) 42, 43.

"The action was commenced in June, 1859. The summons was signed by the respondent's attorney, and re-

quired the appellants to answer within twenty days, etc. The objections taken to the summons were: That it does not run in the name of 'The State of Wisconsin;' is not sealed with the seal of the court; is not properly tested in the name of the presiding judge; and does not give the appellants ninety days to answer, but requires them to answer within twenty days.

"When the nature and office of a summons are considered, as indicated by the code of procedure, which code is incorporated in, and becomes a part of our present Revised Statutes, we are clearly of the opinion that it cannot properly be said to be a 'writ,' or 'process,' within the meaning of chapter 136, Revised Statutes, and of section 17, article VII, of the Constitution. And it is quite evident that the legislature must have taken the same view of the matter, not regarding a summons as a 'writ' or 'process' within the constitutional meaning of those terms, or it would not have passed the sections of chapter 124 relating to it; for by the provisions of that chapter, it is expressly declared that an action may be commenced by service of summons with or without seal, which summons shall be subscribed by the plaintiff or his attorney, etc. It is not required to be issued out of a court of record, to be sealed with the seal of the court, and tested in the name of the presiding judge, as the writs contemplated by chapter 136, must be." Porter v. Vandercook et als. (1860) 11 Wis. 70.

Many states in addition to those whose decisions are cited above probably have provisions similar to section 106 of the Constitution of Virginia. This provides:

"Writs shall run in the name of the Commonwealth of Virginia and be attested by the clerks of the several courts. . . ." Va. Constitution, sec. 106.

But in those states as in Virginia the Bar has generally and properly concluded that such statutory or constitutional provisions in reference to writs or process, which is

one kind of writ, have no application to notices given by parties or their attorneys, where given as a means of instituting an action under sections similar to Virginia Code, section 6046.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1936

No. 11

L. P. CHISHOLM,
WALLER HOLLADAY,
W. EARLE CRANK,
T. S. WINSTON, and
W. R. DUNKUM, Petitioners,

v.

W. B. GILMER, RECEIVER FOR THE FIRST NATIONAL BANK OF LOUISA, LOUISA, VIRGINIA, Respondent

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BRIEF OF RESPONDENT.

To the Honorable Chief Justice and Associated Justices of the Supreme Court of the United States:

FACTS.

This hearing is limited to question of whether the District Court had jurisdiction of the defendants, in the court below and petitioners in this court. Therefore, only those facts showing how the court acquired jurisdiction of the petitioners are relevant. The proceeding was instituted by notice of motion in accordance with the Virginia statutes as stated by counsel for petitioners on page 2 of his brief and four of the five petitioners filed pleas in abatement and motions to dismiss, but no plea in abatement or motion to dismiss was filed by T. S. Winston (R. 4-8). All of the statement of facts in regard to subsequent pro-

ceedings leading up to and during the trial are immaterial. The pleas in abatement and motions to dismiss were on the following grounds:

1. No process can issue out of a federal court under Section 721 of the Judicial Code of the United States unless under the seal of the court and signed by the clerk.

2. No persons except those voluntarily appearing can be made parties defendant in a federal court so as to get a personal judgment against them unless served with process issued under Section 721 of the Judicial Code.

3. This action was commenced without process under the seal of the court and signed by the clerk, and that therefore the court acquired no jurisdiction over the person of the petitioners.

4. That Section 724 of the Judicial Code, known as the Conformity Act, has no application to proceedings to collect an assessment on stock in a national bank.

It is conceded that *process issuing from a federal court* must be under the seal of the court and signed by the clerk and that no process issued from a court to institute this action.

QUESTIONS.

Three questions are therefore presented for determination:

1. Is a writ issuing from a court necessary to commence an action at law?

2. Is the notice of motion by which this action was begun a writ within the meaning of Section 721 of the Judicial Code?

3. Does Section 724 of the Judicial Code apply to actions to collect an assessment levied by the Comptroller on stockholders in a national bank?

We will discuss these in the order named.

IMPORTANCE OF QUESTIONS.

This procedure is used in 14% to 95% of cases in federal courts in Virginia. Eley v. Gamble, 75 Fed. (2d) 171, 173. Ninety percent of Federal cases at Abingdon and fifty-four out of fifty-five at Norfolk (36 West Virginia Law Quarterly, 82, where excellent tables are given, pages 72-82 on extent of use of notice of motion). If a writ is necessary to commence an action most default judgments in the Virginia State courts and federal courts in Virginia and many other states are void. Section 106 of Virginia Constitution provides:

> "Writs shall run in the name of the 'Commonwealth of Virginia,' and be attested by the clerks of the several courts. Indictments shall conclude 'against the peace and dignity of the Commonwealth.' "

The constitutions of many other states have similar requirements. It has been uniformly held that they have no application to proceedings by notice of motion and that such proceeding may be instituted without writs. If these notices are writs or writs are necessary to commence such actions, then all default judgments in such proceedings are void. These proceedings are also used in many other states. It is very similar to the procedure recommended in "Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia," prepared by the Advisory Committee on Rules of Civil Procedure Appointed by the Supreme Court of the United States. See Rule 4, page 7.

This procedure is the oldest code pleading in an English speaking country. It is more than two centuries old, more than half a century older than the United States. It was authorized by Acts of May, 1732, c. 10, sec. 8, 4 Va. Stat.

(Hening) 352 and extended and enlarged, eight times before 1800. It was enlarged by 1832 to cover twenty-five classes. Robinson Practice (1832 ed.) 589-621.

This is the simpliest procedure known in the United States. It has worked well in Virginia for more than two hundred years and in other states which have copied our procedure. See "Summary Civil Procedure", 38 Yale Law Journal 193, 423, also report 36 West Virginia Law Quarterly 1, 82. It would be unfortunate indeed if we were to lose the oldest and most successful simplified procedure, which has been developed during over two centuries.

NATURE OF PROCEDURE.

Section 6046 of the Code of Virginia authorizing this procedure will be found on pages 60-61 of the appendix.

This procedure and its history, are well described by Robert Wyness Millar of the Yale Law School in 38 Yale Law Journal 193, 215, from which we quote as follows:

"The manner of proceeding here in question seems to have had its origin in Virginia. As early, at least, as 1732,[116] statutes begin to appear in this jurisdiction providing for summary judgment on motion against sheriffs and other officers failing to pay over public moneys to the proper recipient. In 1748, it was enacted, with reference to forthcoming bonds given on execution, that such a bond should have the force of a judgment and, if not paid, the court was empowered, 'upon motion of the party to whom the same is payable, to award execution thereupon, with

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116. Acts of May, 1732, c. 10, sec. 8, 4 Va. Stat. (Hening) 352. This act relates to the failure of the sheriff to account to the secretary of the colony and the clerk of the county court for fees coming to his hands. Numerous later statutes prescribe the same remedy in respect of collecting officers failing to pay over the proceeds of taxes and duties. E. g., 1756, 7 Va. Stat. (Hening) 12; 1759, ibid. 263; 1761, ibid. 396; 1762, ibid. 542; (1769) 8 Va. Stat. (Hening) 346; (1775) 9 Va. Stat. (Hening) 67; 1776, ibid. 222; cf. Acts of October, 1705, c. 9, sec. 9, 3 Va. Stat. (Hening) 266.

costs; provided the obligors have ten days notice of such motion.'[117] In 1753, the sheriff or other officer failing to return an execution is subjected to a fine for the benefit of the judgment-creditor, recoverable by motion for judgment upon 'ten days' previous notice of the motion for judgment for such fine.'[118] And in 1786 occurs the most noteworthy provision—forerunner of many statutes of the same kind—that the surety who has paid a judgment rendered against him for the principal's debt may proceed against the principal by motion for judgment to recover the amount so paid.[119] The same law extends the remedy also to the case of one surety, who has thus had judgment rendered against him, and is now seeking contribution from a co-surety, where the principal has become insolvent.[120] Again, in 1787, the proceeding is made available to a client for the recovery of money wrongfully withheld by an attorney.[121] It is not here in place to review in detail the progress of this legislation; suffice to say that as time went on the remedy was applied to other situations with such generosity that the first edition of Robinson's Practice (1832) enumerates some twenty-five categories in which it is at a plaintiff's command.[122] With respect to the proceeding itself, the author observes:

> 'In various cases the legislature have authorized judgment to be entered and execution to be awarded, upon motion, in a summary way . . . In giving these summary remedies, the legislature always provide that the party proceeded against shall be given notice of the motion, for ten days, or some reasonable time . . . In motions upon forthcoming bonds and replevy bonds, it is very common to give notice ore tenus. In other motions it is usual for the plaintiff to

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117. Acts of October, 1748, c. 12, sec. 14, 5 Va. Stat. (Hening) 534.
118. Acts of November, 1753, c. 1, sec. 25, 6 Va. Stat. (Hening) 344.
119. Acts of October, 1786, c. 15, secs. 1, 2, 12 Va. Stat. (Hening) 268.
120. Ibid. sec. 3.
121. Acts of October, 1787, c. 10, sec. 3, 12 Va. Stat. (Hening) 473.
122. Pp. 589-621.

write a notice to the defendant, of the intended motion; and this written notice is returned to the court in which the motion is made, with an affidavit shewing that a copy thereof has been duly delivered.' [123]

"As it was in Virginia that the proceeding had its inception, so it was here that it took on an entirely new significance. This occurred in 1849, at the instance of the revisers whose labors culminated in the Code of that year. In their report they informed the legislature, that

'by this mode of proceeding, all claims of the Commonwealth, and a large number of those individuals are now recoverable; yet a formal point scarcely ever arises upon a motion. The case is very generally decided upon its merits. A brief notice serves the double purpose of a writ and a declaration; and though a defendant is not precluded from pleading, yet as the case can be heard without pleading, pleadings are in fact very rarely filed. Seeing that this mode of proceeding has worked well in the cases in which it has been heretofore allowed, it seems to us advisable to extend it to all cases in which a person is now entitled to recover money by action on a contract. We do not propose to take away the right of bringing an action from any person; we propose merely, when his claim to money is on a contract, to allow him to use, if he please, the more simple remedy by motion, instead of an action. The permission to proceed in this way will, we believe, cause motions gradually to take the place of actions for all such claims.' [124]

"The result was the inclusion in the Code of 1849 of certain sections appropriate to this purpose. It was provided that:

'any person entitled to recover money by action on any

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123. P. 589.

124. Report of Revisers, cited in Wilson v. Dawson, 96 Va. 687, 691 (1899). See also Barton, Practice in the Courts of Law in Civil Cases (1877) 333.

contract, may, on motion . . . obtain judgment for such money after sixty days' notice, which notice shall be returned to the clerk's office of such court forty days before the motion is heard.' [125]

"And further that:

'on a motion when issue of fact is joined, and either party desire it, or when, in the opinion of the court it is proper, a jury shall be empaneled, unless the case be one in which the recovery is limited to an amount not greater than twenty dollars, exclusive of interest.' [126]

"In this form the statute remained until 1887, when by the revision of that year the time of notice was cut down to fifteen days with modification, also, of the post-return period, it now being provided that the notice should be returned ten days before the commencement of the term.[127] In 1896, a provision was included extending to this form of proceeding the requirement of an affidavit of merits from the defendant in case of affidavit of claim made by the plaintiff.[128] But by 1912 the remedy had attained such additional growth in favor as to call for a further enlargement of its scope. By a process of amendment beginning in that year, it was made applicable to actions of tort,[129] to actions on contracts not previously falling within its sphere,[130] to actions for statutory penalties [131] and to actions for the recovery of specific personal property or damages in lieu thereof.[132] This movement had its logical outcome in the revision of 1919, by which the remedy became available for common law actions in general through the provision that 'any person entitled to maintain

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125. Va. Code (1849) c. 167, sec. 5.
126. Ibid. sec. 6.
127. Va. Code (1887) sec. 3211.
128. Va. Acts (1896) 140.
129. Va. Acts (1912) 15.
130. Ibid. 651.
131. Ibid.
132. Va. Acts (1916) 760.

an action at law may, in lieu of such action, proceed by motion.' [133]

"After 1887, the proceeding also underwent some re-regulation with respect to its time requirements. Thus, by the amendment of 1896 there ceased to be any appointment of a secondary or post-return period, or any necessity of return in advance of the hearing term: the substituted provision was that the notice should be returned within five days after service and should be docketed upon the lapse of the notice period.[134] And, when in 1912, the remedy was extended to actions of tort, thirty days notice was here prescribed, instead of the usual fifteen.[135] But now, under the revision of 1919 and the further amendment of 1922, the notice-period for all cases of the general proceeding, is one of at least fifteen days and ordinarily not more than ninety days; return of the notice continues to be called for within five days after services; but the cause is now docketed on the return day, that is to say, the day named in the notice for the making of the motion." [136] 38 Yale Law Journal, Summary Civil Procedure, 193, 215.

A good explanation of the reason for the success has been the attitude of the courts as is shown by the article, "Summary Civil Procedure" by Robert Wyness Millar,

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133. Va. Code (1919) sec. 6046. For a fuller account of the amendments leading up to the enactment of this provision, see Revisers' Note to the section in question.

134. Va. Acts (1895-1896) 140; M. P. Burks, Pleading and Practice in Actions at Common Law (1st ed. 1913) 164-165. By the revision of 1887, as above appears, the notice was to be returned ten days before the term. Under the Code of 1849, although this was silent as to the time of the return with relation to the commencement of the term, requiring only that the notice be returned forty days before hearing, it was held that this return had to be in advance of the opening of the term: in other words that the cause had to be "matured for the docket before the term." Hale v. Chamberlain, 13 Gratt. 658 (Va. 1857), as interpreted by Hanks v. Lyons, 92 Va. 30 (1895).

135. Va. Acts (1912) 15.

136. Va. Code (1919) sec. 6046; Va. Acts (1922) 763; Morrissett, **Legislation of 1922** (1922) 8 Va. L. Reg. (N. S.) 81, 97-98. The ninety days maximum may be exceeded where the next term does not commence within ninety days from the date of service.

38 Yale Law Review, 193. We quote from page 219 as follows:

"There can be no doubt that an important element operating in favor of the remedy is the sympathetic consideration which it has received at the hands of the courts from the earliest period of its history. In 1797, speaking with reference to a proceeding by motion instituted by a sheriff against his deputy and the sureties of the latter, to recover execution-moneys not accounted for, Roane, J., said:

" 'I am strongly inclined to view notices with indulgence, seeing that they are the acts not of lawyers but of the parties.' [142]

"This became the settled canon of construction. The foregoing expression was reiterated and expanded in Supervisors v. Dunn (1876) [143] in the following terms:

" 'The rule governing notices is that they are presumed to be the act of the parties and not of lawyers. They are viewed with great indulgence by the courts; . . . if the terms of the notice be general, the court will construe it favorably, and apply it according to the truth of the case, as far as the notice will admit of such application. If it be such that the defendant cannot mistake the object of the motion, it will be sufficient.' [144]

"In the latter case, as in the former, the motion was one under a special statute, but the same doctrine unreservedly obtains wherever the proceeding is used.

" 'A proceeding by motion under Virginia Code (1904) sec. 3211,' said the court in Whitley v. Booker Brick Co. (1912) [145] 'is intended to furnish a simpler, more

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142. Drew v. Anderson, 1 Call. 50, 52 (Va. 1797).

143. 27 Gratt. 608, 612 (Va. 1876).

144. Citing Graves v. Webb, 1 Call. 443 (Va. 1797); Segouine v. Auditor, 4 Munf. 398 (Va. 1815); Steptoe v. Auditor, 3 Rand. 221 (Va. 1825).

145. 113 Va. 434, 436 (1912).

expeditious, and less expensive remedy for the collection of debts than by action, and the same is true of motions generally. Hence, we find that the uniform course of decision in this State has been to view with more leniency and to allow greater laxity in the pleadings in that form of procedure.' [146]

"On the other hand 'this does not relieve the plaintiff of the requirement that he set out in his notice to the defendant matter sufficient to maintain the action, and whether or not he has done this is the sole question raised by the demurrer to the notice.' [147] Nor is it open to the plaintiff to allege one thing and prove another: 'The rule that the allegata and probata must correspond is likewise applicable to proceedings by way of motion.' [148]

"The gain from the use of this proceeding is not confined to its doing away with the formal writ and its simplification of the pleadings. Under the Virginia practice as to terms of court, it enables the plaintiff to move more rapidly than would otherwise be possible.

" 'The second and chief advantage' says the author of the standard work on modern Virginia common law practice, 'is that you may proceed by motion when it is too late to mature a regular action, or even after a term of court has begun, if it shall continue in session long enough for this purpose, as many of the city courts do. It requires two sets of rule days to mature

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146. Accord: Rinehart v. Pirkey, 126 Va. 346, 352 **et seq.** (1919); Shreck v. Va. Hot Springs Co., 140 Va. 429, 432 (1924). But the presumption originally underlying the doctrine seems to have been discarded. "The procedure by notice under section 6046 of the Code is looked upon with great indulgence, not because the notice is supposed to be the act of a layman ignorant of forms of law, for that would be contrary to almost universal experience, but because the courts are loath to sacrifice substance to form and desire, so far as possible, to avoid that result." Per Burks, J., in Mankin v. Aldridge, 127 Va. 761, 767 (1920).

147. Security Loan Co. v. Fields, 110 Va. 827, 829-830 (1910). **Accord:** Matthews v. La Prade, 130 Va. 408, 413 (1921); Wessel v. Bargamin, 137 Va. 701, 707 (1923).

148. Burks, Pleading and Practice, at 170.

a regular action, but you may proceed by motion, as just stated, after either or both sets of rule days have passed, and if there is time enough to give the requisite notice may thus proceed to obtain judgment by motion when it will be too late to obtain it by a regular action.' [149]

"The success of the remedy is plainly attested by the pains recently taken for its extension and improvement, as well as by the numerous cases in the court of review in which the plaintiff has elected to utilize it. That success, moreover, is unqualified. In 1895, when the general proceeding was still confined to actions on contracts, we find it stated by competent authority 'that in plain cases the summary remedy by motion has almost superseded the common law forms of action for the recovery of debts.' [150] Since its extension in 1919, while it has not as yet dislodged the other common law actions to the same degree, it has made constant and increasing inroads upon their province.[151] The probability is, therefore, that in time there will occur in Virginia what has happened on sundry occasions in the history of procedure on the Continent of Europe, namely, that the summary procedure has become the ordinary one.

"But the career of the remedy in Virginia does not tell the whole story. For, with other Virginia institutions, the

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149. Ibid. 168.

150. E. C. Burks, Note to Hanks v. Lyons (1895) 1 Va. L. Rev. 441.

151. "I can confidently say—that the summary proceeding by notice and motion, under the Virginia statute, is popular with the Virginia bar, and that it is much used. It has been more used, certainly, since the remedy has been extended to any action at law. It is more popular with some attorneys than with others, and in some localities than in other localities. I think I can say, however, that whenever an attorney finds that he has a case in which he must draw his declaration with extreme care in order to avoid a troublesome demurrer, he will relieve himself of some of his uneasiness by filing his notice and motion. I think the statute has been altogether beneficial and a great boon to lawyers who desire to avoid the pitfalls of common law pleading." President Prentis of the Supreme Court of Appeals in letter to the present writer, under the date of November 19, 1927 (Mr. Millar).

proceeding by motion found place in the legislation of West Virginia. The latter's first Code, that of 1870, besides putting it at the plaintiff's disposal in sundry single instances, reproduced verbatim the contemporary Virginia provisions with reference to its general use in actions on contracts to recover money. There was added, however, the declaration that 'defense to such motions may be made in the manner and to the same extent as in actions at law.'[152] In 1882, the statute was amended so as to shorten the period of notice and the period which must elapse between the return of notice and the hearing, from the original sixty and forty days, respectively, to thirty and twenty days.[153] By further amendments, adopted in 1915, these periods were again abridged, the former to twenty and the latter to fifteen days, and provision was made for affidavit of claim and affidavit of merits as in the ordinary procedure.[154] Meanwhile, it had been necessary that the notice be returned in advance of the hearing term;[155] but in 1925 this rule was changed and brought into substantial alignment with the later Virginia rule by the provision that the motion 'may be commenced and matured during the term . . . and may be heard at the same term' if this has not expired before the lapse of the notice-period.[156] Thus, the remedy, in West Virginia, apart from special instances, remains limited to cases where the plaintiff 'is entitled to recover money by action on any contract.'[157]

"In dealing with the sufficiency of the notice, the West Virginia courts follow the Virginia doctrine which accords its contents a liberal construction,[158] but contemplates the statement of a good cause of action.[159] Its purpose is said

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152. W. Va. Code (1870) c. 121, secs. 6-8, p. 593.

153. W. Va. Acts (1882) 171.

154. W. Va. Acts (1915) 449.

155. Knox v. Horner, 58 W. Va. 136 (1905); Citizens' Nat. Bank v. Dixon, 94 W. Va. 21 (1923).

156. W. Va. Acts (1925) 283.

157. W. Va. Code Ann. (Barnes, 1923) 2133-2135.

158. Board of Education v. Parsons, 22 W. Va. 308 (1883).

159. Hastings v. Grump, 89 W. Va. 111 (1921); Anderson v. Prince, 60 W. Va. 557 (1906).

to be that of acquainting the defendant with the grounds on which the plaintiff proposes to proceed against him, and 'all that is required in such notice is that it should be so plain that the defendants cannot mistake the objects of the motion, however it may be wanting in form and technical accuracy.'"[160] 38 Yale Law Journal, Summary Civil Procedure, 193, 219, (1928).

Quoting further from page 223 of the same article:

"Concededly, the progress of the remedy has been slower here (in W. Va.) than in Virginia. Not only has legislation in respect of its scope halted with adoption of the Virginia provision of 1849, but even in the case of the contract actions for which it was thus made available, its employment has not been as extensive as in the older States. Nevertheless, this employment is on the increase, and at present approximately half the number of these actions are brought in the summary form. Moreover, since the Virginia amendment of 1919 attempts have been made to obtain here the adoption of a similar statute. In view of the growing favor which attends the remedy, the prospects are that this manner of legislation will not be long deferred. For West Virginia, therefore, it is apparently but a question of time until the remedy attains a success equal to that which it has already achieved in Virginia." 38 Yale Law Journal, Summary Civil Procedure, 193, 223.

This proceeding has also been ably discussed by Charles E. Clark, Dean of the Law School of Yale University and Charles E. Samenow in "The Summary Judgment", 38 Yale Law Review, 423. We quote from page 463 of this article:

"The origin of the summary proceeding by motion for

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160. Shepherd v. Brown, 30 W. Va. 13, 19 (1887). **Accord:** Stuarty v. Carter, 79 W. Va. 92 (1916); People's State Bank v. Jeffries, 99 W. Va. 399 (1925).

judgment has been attributed to Virginia. The use of the procedure against sheriffs and other officers, sureties, attorneys, and on execution bonds began as early as 1732. By 1849, at the time of the adoption of the first of the Codes, sentiment toward widening the scope of the procedure crystallized in its extension to the use of 'any person entitled to recover money by action on any contract.' In 1919, after a number of intermediate steps, it had been made to include within its borders all actions at law.

" 'Any person entitled to maintain an action at law may, in lieu of such action at law, proceed by motion before any court which would have jurisdiction of such action, after not less than fifteen days' notice, which notice shall be in writing signed by the plaintiff or his attorney, and shall be returned to the clerk's office of such court within five days after service of the same . . .

" 'The defendant may make the same defenses to the notice as to a declaration in an action at law, and in the same manner, or he may state his grounds of defense informally in writing, and in the latter event the parties shall be deemed to be at issue on the grounds stated without replication or other pleading on the part of the plaintiff. No plea in abatement under this section shall be received after the defendant has demurred, pleaded in bar or filed such statement of his grounds of defense.'

"The noteworthy feature of this section is the complete absence of any requirement of formality. Indeed its wording contemplates that the notices be acts of the parties rather than of their attorneys. In spite of the freedom here permitted the notice must state a good cause of action; it must be a notice. Moreover, either party may demand a bill of particulars. The total effect of the provision is a simplification of the pleadings, thus enabling the plaintiff to move much more rapidly than he otherwise could.

"Section 6047 allows the plaintiff to move against a

number of defendants either jointly or severally, or against an intermediate number. 'Such motions may be made from time to time until there is a judgment against every person liable, or his personal representative.' The next section (6048) provides that when an issue of fact is joined and either party desires it or, when in the opinion of the court, it is proper, a jury shall be impaneled.

"The latter part of section 6046 and section 6133 represent a combination of the subjects embraced in the statutes of 1849 and, to a certain extent, the English summary judgment. They apply the procedure specified in section 6046 respectively to actions on account and in assumpsit. As in many other jurisdictions, a number of the cases deal with the sufficiency of the affidavit. This is not, however in this jurisdiction, an indication of an unfavorable attitude of the courts. Indeed the tendency in Virginia seems to be to replace the technical common law forms with this informal motion for judgment." 38 Yale Law Journal, 1928-1929. The Summary Judgment, 423, 463.

This procedure is discussed in the report of the College of Law of West Virginia to the Bar Association, 36 W. Va. Law Quarterly, 5, 70. From page 70 of this article, we quote:

"We have gone to some trouble to study the actual working of the motion procedure in Virginia as applied to all actions at law. The best method seemed to be to send out letters to all the clerks of court, all of the judges, and about fifty representative lawyers for whose selection we are indebted to Mr. Stuart Campbell, a member of the Board of Law Examiners of Virginia. As a result of these statistics the following statements may be made without hesitation.

"(1) The motion for judgment procedure has practically supplanted the common law actions in all classes of actions, both in tort and in contract. The only ex-

ceptions are where there is a special statutory form provided, such as ejectment, and in cases of extraordinary remedy such as mandamus, prohibition, etc. (2) There is a practically unanimous approval of this method of procedure among both bench and bar.

"(3) Although there is an option of pleading common law defenses to the motion, the informal method of defense is becoming used in a majority of counties to the exclusion of the old common law plea.

"(4) The great majority of replies indicate that the informal method of defense is regarded as a quicker and more convenient method of pleading than the old common law pleas . . ." 36 W. Va. Law Quarterly, 70. (1929-1930).

To this article is appended a number of forms suggested for use in these proceedings. These extend from page 83 to page 102. A casual glance at them would show the extent which this form of procedure simplifies pleadings.

WRIT NOT REQUIRED TO COMMENCE ACTION.

A writ issuing from a court is not necessary to commence an action at law. There is nothing in the statutes or constitution requiring a writ issuing from the court to institute an action. In fact for more than two hundred years actions have been instituted in Virginia without such a writ. The due process clause of the United States Constitution does not require it. In at least one case, an appeal was taken to the United States Supreme Court on the ground that the proceeding was instituted by a motion instead of by some other form. The court disposed of this contention without difficulty. In the statement of facts is the following statement:

"A copy of said petition with notice of an intention to apply for an order to show cause why the order and

decree referred to should not be obeyed, was served upon the railway company." Iowa Central Railway Company v. Iowa, 160 U. S. 389, 391; 16 S. Ct. 344; 40 L. Ed. 467.

Mr. Justice White in the opinion disposed of this contention as follows at page 392:

"Indeed, there was no mention of any right thereunder until the filing of a brief for defendant entitled 'Defendant's Resistance and Objection to Plaintiff's Motion to Enter Order Prayed for in the Petition,' in the ninth paragraph whereof it was claimed that it would be a violation of the Fourteenth Amendment of the Constitution of the United States to grant the order prayed for upon the motion in question. It is apparent that this defence merely asserted that the rights of the corporation as a citizen of the United States would be impaired by enforcing the claim urged against it on the motion, instead of by another and less summary form of action. But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege, or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of by another. It is also equally evident, provided the form sanctioned by the state law gives notice and affords an opportunity to be heard, that the mere question of whether it was by a motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of those words."* Iowa Central Railway Co. v. Iowa, 160 U. S. 389, 392-3, 16 S. Ct. 344; 40 L. Ed. 467.

United States Supreme Court has held a judgment may be entered on a rule.

> "It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend. Iowa Central Railway v. Iowa, 160 U. S. 389; Wilson v. North Carolina, 169 U. S. 586. . . . The mere fact that the proceeding to hold it liable was by rule, does not conflict with due process under the Fourteenth Amendment, for, as we have seen, forms of procedure in the state courts are not controlled by the Fourteenth Amendment, provided the fundamental rights secured by the amendment are not denied." Louisville & Nashville Rd. Co. v. Schmidt, 177 U. S. 230, 236, 238; 20 S. Ct. 620; 44 L. Ed. 470.

Due process only requires reasonable notice and opportunity to be heard.

> "Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, Pennoyer v. Neff, 95 U. S. 714, 733; Scott v. McNeal, 154 U. S. 34; Old Wayne Life Association v. McDonough, 204 U. S. 8, and that there shall be notice and opportunity for hearing given the parties, Hovey v. Elliott, 167 U. S. 409; Roller v. Holly, 176 U. S. 398; and see Londoner v. Denver, 210 U. S. 373. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods

of trial, and held them to be consistent with due process of law." (Citing 21 U. S. Supreme Court decisions.) Twining v. New Jersey, 211 U. S. 78, 110, 29 S. Ct. 14, 53 L. Ed. 97.

"The fundamental requisite of due process of law is the opportunity to be heard. Louisville & Nashville Ry. Co. v. Schmidt, 177 U. S. 230, 236. Simon v. Craft, 182 U. S. 427, 436. And it is to this end, of course, that the summons or equivalent notice is employed." (This is a dictum.) Grannis v. Ordean, 234 U. S. 385, 394; 34 S. Ct. 779, 58 L. Ed. 1363.

This latter statement was merely a dictum in a case involving an order of publication.

The due process clause of the constitution is concerned with substance, not forms of procedure.

"It has been so often pointed out in the opinions of this court that the Fourteenth Amendment is concerned with the substance and not with the forms of procedure as to make unnecessary any extended discussion of the question here presented. The due process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defense; due regard being had to the nature of the proceedings and the character of the rights which may be affected by it. Hurtado v. California, 4 S. Ct. 111, 110 U. S. 516, 28 L. Ed. 232; Maxwell v. Dow, 20 S. Ct. 448, 176 U. S. 581, 44 L. Ed. 597; Louisville & Nashville R. Co. v. Schmidt, 20 S. Ct. 620, 177 U. S. 230, 44 L. Ed. 747; West v. Louisiana, supra; Twining v. New Jersey, 29 S. Ct. 14, 211 U. S. 78, 53 L. Ed. 97; Oregon R. R. & N. Co. v. Fairchild, 32 S. Ct. 535, 224 U. S. 510, 56 L. Ed. 863." State of Missouri, ex rel. Hurwitz v. North (1926), 271 U. S. 40, 42, 70 L. Ed. 831, 46 S. Ct. 384, 385.

In Coffin Brothers & Co. v. Bennett, 277 U. S. 29, 72

L. Ed. 468, 48 S. Ct. 422, the court upheld a state law which in the case of stockholders of the state bank authorized issuing of an execution in advance of trial where the debtor had a right to contest the liability after the issuance of the execution. In other words, it held that in that class of cases, the action might be commenced by the issuance of an execution by the state banking commission.

Numerous other United States Supreme Court cases could be cited to show the defendant has no right to any particular form of procedure or writ so long as he is afforded reasonable notice of the case against him and an opportunity to be heard. The notice of motion in this case (R. 1), plainly shows that the defendants had reasonable notice of the claim against them. The rest of the record including particularly the evidence of all defendants except the representatives of deceased defendants (R. 23-50), shows that full opportunity to be heard was given them.

NOTICE OF MOTION UNDER SECTION 6046 NOT A WRIT.

This brings us to the second question, namely, is the notice of motion a writ or process within the meaning of section 721 of the Judicial Code of the United States, which reads as follows:

> "All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the Supreme Court or a district court shall bear teste of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence, and those issuing from a district court shall bear teste of the judge, or, when that office is vacant, of the clerk thereof. The

seals of said courts shall be provided at the expense of the United States."

or section 106 of the Virginia Constitution which is as follows:

"Writs shall run in the name of the 'Commonwealth of Virginia,' and be attested by the clerks of the several courts. Indictments shall conclude 'against the peace and dignity of the Commonwealth.' "

WRITS AND NOTICES COMPARED.

The notice of motion is not process under section 721 of United States Code or a writ under section 106 of Virginia Constitution. It differs from process as follows:

1. Process is signed by the clerk of the court and the notice of motion by the party or his attorney.

2. Process runs in the name of king, president or state and notice in the name of plaintiff.

3. Process is directed to the marshal, sheriff or other court officer. A notice is directed to the defendant.

4. A process is a court paper from its issuance. A notice is a court paper only when returned to the clerk of the court after being executed.

5. Process must generally be served by an officer. A notice under section 6046 of the Virginia Code is sufficient under section 6041 "which has reached its destination, within the time prescribed by law . . . although not served in the manner above mentioned."

6. Issuance of a process stops the running of the statute of limitations. Only the return of the executed notice to the clerk's office stops the statute. Furts Bros. v. Banks, 101 Va. 208, 42 S. E. 360, Burks Pleading & Practice, 2nd Ed. 232, also 391.

7. Process is a command to the party against whom it

is issued. A notice is not a command but is merely notification of the proposed action of the plaintiff.

That a notice is not a writ or process was held in Kain v. Ashworth, 119 Va. 605, 89 S. E. 857, September 11, 1916.

> ". . . A process emanates from a court and under the provisions of section 6055 is usually directed to the sheriff of the county, while a notice which **takes the place of the writ and declaration** is directed to the defendants named therein and has its emanation in the act of the plaintiff in sending it forth, and may be served by a layman." Wood v. Kane, 143 Va. 281, 286, 89 S. E. 857. (Sept. 1925). (**Bold face** ours).

PROCEDURE BY NOTICE OF MOTION APPROVED BY FEDERAL COURTS.

This is the usual and proper procedure in the United States district courts in Virginia. The practice in the Eastern District of Virginia and the law is very fully and carefully reviewed by the United States Circuit Court of Appeals in 1935 in the case of Eley v. Gamble, 75 F. (2d) 171, 172. An able and carefully worked out opinion was handed down by Judge Parker, the senior Circuit Judge. We quote at length from this opinion:

> "These are appeals from judgments in favor of the receiver of the First National Bank of Portsmouth, Va., in actions instituted by him to recover on stock assessments made by the Comptroller of the Currency against the stockholders of that bank. All of these actions except three, Nos. 3771, 3774, and 3775, were instituted by notice of motion for judgment pursuant to the Virginia statute, Code of 1930, sec. 6046; and in each of them a plea in abatement was filed on the ground that the notice of motion did not conform to section 911 of the Revised Statutes (28 U. S. C. A., sec. 721) requir-

ing that 'all writs and processes issuing from the courts of the United States' shall be under the seal of the court from which they issue, bear teste of the judge, and be signed by the clerk. In No. 3772 the additional point was raised, by motion to dismiss, that the notice of motion had not been properly served upon the defendant. Nos. 3771, 3774 and 3775 were actions of debt, in each of which a demurrer was filed on the ground that debt would not lie to recover in such case. On the trial there was a motion by the defendant in each case for a directed verdict, on the ground that plaintiff had not proven nonpayment of the stock assessments, or that the defendants owned the stock on which assessments were laid, or were the same persons shown in the books as owners of the stock.

"The appeals in the various cases present the following questions for our consideration: (1) Whether action can be commenced in the federal courts in Virginia by notice of motion under the Virginia statute without compliance with section 911 of the Revised Statutes (28 U. S. C. A., sec. 721); (2) whether service of notice of motion in accordance with the provisions of the Virginia statute is sufficient service to give a federal court in Virginia jurisdiction of the parties in an action so commenced; (3) whether debt is an appropriate form of action for the recovery of a stock assessment; and (4) whether the defendants were entitled to a directed verdict upon any of the grounds mentioned. We think that all of these questions must be answered in favor of the receiver.

"On the first question, it is clear that, as the commencement of an action is a matter of procedure, it is governed by the state practice. 28 U. S. C. A., sec. 724 Burns Mortgage Co. v. Fried, 292 U. S. 487, 54 S. Ct. 813, 79 L. Ed. 1380, 92 A. L. R. 1193. And here the practice prescribed by the state statute was clearly followed in all of the cases. It is argued that section 911 of the Revised Statutes (28 U. S. C. A., sec. 721), which requires all writs and processes issuing from

the courts of the United States to be under the seal of the court and to be signed by the clerk, is applicable to the notice of motion under the statute of Virginia; but the answer to this is that the notice of motion is not a writ or process issuing from the court. The notice takes the place of the writ and declaration under the Virginia practice. Virginia Hot Springs Co. v. Schreck, 131 Va. 581, 109 S. E. 595; Security Loan & Trust Co. v. Fields, 110 Va. 827, 67 S. E. 342; Morotock Ins. Co. v. Pankey, 91 Va. 259, 21 S. E. 487. But it is not process emanating from a court and subject to the restrictive provisions relating to such process. Wood v. Kane, 143 Va. 281, 129 S. E. 327, 329; Kain v. Ashworth, 119 Va. 605, 89 S. E. 857. As said in Wood v. Kane, supra: 'A process emanates from a court, and under the provisions of section 6055 is usually directed to the sheriff of the county, while a notice, which takes the place of the writ and declaration, is directed to the defendants named therein, and has its emanation in the act of the plaintiff in sending it forth, and may be served by a layman.'

"The state of Virginia has seen fit to provide that, in lieu of the procedure followed in actions at law, a party entitled to maintain such action may proceed by motion before any court which would have jurisdiction of the action, upon giving 15 days' notice of the motion to the party against whom relief is asked. Code of Va. of 1930, sec. 6046. There is no reason why the state may not provide for action by the court upon notice of this character; for it is well settled that due process does not require any particular form or method of procedure. It is sufficient if reasonable notice and reasonable opportunity to be heard and to present any claim or defense are afforded; due regard being had to the nature of the proceeding and the character of rights which may be affected by it. State of Missouri ex rel. Hurwitz v. North, 271 U. S. 40, 46 S. Ct. 384, 70 L. Ed. 82; Iowa Central R. Co. v. State of Iowa, 160 U. S. 389, 16 S. Ct. 344, 40 L. Ed. 467. And it would largely defeat the purposes of the Uniformity Act if

the courts should hold the procedure under the notice of motion statute inapplicable to actions in the federal court. Letters of the clerk and deputy clerks of the District Court for the Eastern District of Virginia, appended to the brief of appellee, show that 95 per cent of the common-law actions instituted in Richmond in recent years, 33 1/3 per cent of those instituted at Norfolk, and 14 per cent of those instituted at Alexandria, have been commenced by notice of motion. 'The object of the statute was to simplify and shorten pleadings and other proceedings, to afford a more speedy remedy for the enforcement of contracts, and give suitors a plain and summary proceeding for the recovery of judgments.' Burk's Pleading & Practice (2d Ed.) 222. The members of the bar have made wide use of the practice which it prescribes, and there is no reason why it should not be followed in the federal courts in accordance with the mandate of the Conformity Act.

"The late Judge McDowell went into this matter very fully in Leas & McVitty v. Merriman (C. C.) 132 F. 510, holding that the state practice established by the notice of motion of judgment statute should be followed under the Conformity Act and that section 911 of the Revised Statutes (28 U. S. C. A., sec. 721) was not applicable. The opinion in this case fixed the practice which has been followed in the federal courts of Virginia for more than 30 years; and we need do no more than refer to the opinion as a clear exposition of the law applicable in the premises. It has been followed by Judge McDowell in Schofield v. Palmer (C. C.) 134 F. 754; and by Judge (later Mr. Justice) Sanford In re Condemnation Suits by United States (D. C.) 234 F. 443, 448, and cited with approval by the Circuit Court of Appeals of the Ninth Circuit in Perris Irr. Dist. v. Turnbull, 215 F. 562, 564. In the Condemnation Suits Case in 234 F. 443, 445, Judge Sanford was dealing with proceedings in condemnation in which the owners of land were brought before the court by service of notice, and by publication as to nonresidents,

as allowed by the Statutes of Tennessee. It was objected that, because of the requirement of section 911 of the Revised Statutes (28 U. S. C. A., sec. 721), the proceeding should have been commenced by summons issued under the seal of the court and signed by the clerk. In upholding the proceedings under the Tennessee statute and holding that section 911 had no application, Judge Sanford said:

"'I think it entirely clear, both upon principle and under the authorities, that in any original suit in a Federal court which must be commenced by a summons or other process of the court, itself, such process must be signed by the clerk and issued under the seal of the court, to be valid, regardless of any different provision as to the form of a summons in the State courts, the general conformity statute not operating to waive this specific requirement as to the process in the Federal courts embodied in section 911 of the Revised Statutes (28 U. S. C. A., sec. 721). Martin v. Criscuola, 10 Blatchf. 211, 16 Fed. Cas. 892 (No. 9,159); Peaslee v. Haberstro, 15 Blatchf. 472, 19 Fed. Cas. 71 (No. 10,884); Dwight v. Merritt (C. C.) 4 F. 614, 615; Middleton Paper Co. v. Paper Co. (C. C.) 19 F. 252, 253.

"'After careful consideration, however, I conclude that the provisions of section 911 only apply to writs and process issuing from the courts themselves, and not to notices given by the parties, which are not process of the court and not embraced within its terms, and hence that in any proceeding which may properly be instituted and proceeded with upon mere notice to the parties in interest, without process from the court itself, the requirements of section 911 have no application.'" Eley v. Gamble, 75 Fed. (2d) 171, 172, 173.

OTHER FEDERAL CASES.

Prior to 1904 there were four circuit court decisions and one district court decision to the effect that process must conform to section 721 of the United States Code. The

latest of these was decided in 1884, 19 Fed. 252. Since the decision of Judge McDowell in Leas & McVitty v. Merriman, 1904, 132 Fed. 510, these old cases do not appear to have been applied to private notices, or followed anywhere.

In 1904 this question was raised before Judge McDowell, a distinguished judge of the Western District of Virginia. Judge McDowell handed down a carefully considered opinion, September 22, 1904, which has been since followed and approved. As the entire opinion is devoted exclusively to the one point before us, it is hard to do much less than copy the decision in this case. There was a proceeding by notice of motion under section 3211 of the Code of 1887, now section 6046:

". . . Upon the calling of the case the defendant's counsel moved that the motion be dismissed on the ground that the notice was not under the seal of the court and not signed by the clerk of the court. The argument is based on section 911, Rev. St. (U. S. Comp. 1901, p. 683) (section 721 U. S. Code):

" 'All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from . . . a Circuit Court shall bear teste of the Chief Justice . . .'

"The question thus raised is in this state of much practical importance. Not only are there many such motion cases, but by section 2732 (now 5461) of the Code of Virginia of 1887 actions of ejectment may be instituted only by a notice given the defendant, to which is attached a copy of the declaration, advising him when and where the declaration will be filed. The practice under this statute has always been that the plaintiff's attorney prepares, signs, and has served the notice, whether the action is brought in the state courts or in the federal courts in this state. There is

no rule of this court bearing on the question. Were it not for some decisions to be adverted to later I should feel justified in overruling this motion without discussing the question. The language used in section 911 (now 721), Rev. St., seems to me to show clearly that it has no relation to such a case as is here presented. However, because of the decisions above mentioned, it is perhaps advisable to enter upon a discussion of the question." . . .

Here Judge McDowell refers to the older cases upon the subject.

"I have reached the conclusion that section 911 does not apply here and for the following reasons:

"(1) On its face this statute applies only to writs and processes issuing from the federal courts. In no sense do the notices we have under consideration 'issue' from the court. The ground for the motion by defendant in the case at bar is highly technical, and could properly be met by a somewhat technical reason for overruling it. But I am not satisfied that this reason is only technical. If the language of this statute can be rightly held to apply to the notices here in question, it could also be held to apply to all the various notices given in the course of litigation in the federal courts. The statute is, most properly, not confined to documents which are used merely to institute a litigation.

"(2) I think section 911 (721), Rev. St. (U. S. Comp. St. 1901, p. 683), means no more than that when a writ or process issues from a federal court it must be signed by the clerk, and shall be authenticated in the manner therein set out. It is not an ordinance to the effect that no action or proceedings in a federal court shall be instituted except by the issue of process, signed by the clerk, duly sealed, etc.

"(3) Notices in ejectment under section 2732, Code Va. 1887, and notices of motion for judgment under sec-

tion 3211 are not, as it seems to me, 'processes.' To my mind, the word 'process,' as used in Rev. St. sec. 911 (721), means an order of court, although it may be issued by the clerk. The summons in a common-law action, which is, I think, a 'process,' in the name of the court commands the sheriff or marshal to summon the defendant, etc. Johnston's Forms, p. 1. The writs of scire facias, fieri facias, habeas corpus, subpoenas for witnesses, subpoenas duces tecum, writs of certiorari, supersedeas, attachments, and of venire facias are all commands or orders of court that something be done. In equity the writ of subpoena, and in criminal cases the bench warrant, command that something be done. Now, the notices under the Code are in no sense commands or orders of court. They are mere notices that the plaintiff will on some specified rule day file the declaration, or make a motion in court. They sometimes are, and may always be prepared, signed, and issued by the plaintiff in person. No rule of practice requires that an attorney shall sign or issue them. They do, it is true, subserve the purposes of processes. But they are not technically processes, and are not necessarily embraced within that term as used in section 911 (721).

"In several of the states a summons in an action may be issued by the plaintiff's attorney. See 19 Am. & Eng. Ency. (1st Ed.) p. 222, notes and cases cited supra. And in at least the majority of such States it is held that a summons is not a process. This conclusion is based on the fact that in such states the summons is not issued by the court, and is not an order of court. If such reasoning have any soundness, it applies much more forcibly to the notices we are considering.

"In Whitney v. Blackburn, 17 Or. 564, 21 Pac. 874, 11 Am. St. Rep. 857, it is said:

" 'Properly speaking, a summons is only a process when issued from the office of a court of justice requiring the person to whom it is addressed to attend the court for the purpose therein stated. Under our Code the

summons is a process to commence a civil action. But technically, such a summons is not a "process" but is more in the nature of a mere notice informing the defendant that an action has been commenced against him, and that he is required to answer the complaint therein within a specified time. In view of this distinction, such notice cannot be considered process in the sense in which that word is used in the books.'

"(4) If we read into section 911 (721), Rev. St. a requirement that notices in ejectment and of motions for judgment are to be treated as processes to be issued by the clerk under seal, we have created a repugnance between sections 911 (721) and 914 (724), Rev. St. This is to be avoided. If one of two reasonable readings of the statute law creates, and the other avoids, a repugnance, the latter should be adopted.

"(5) While the language above quoted from Shephard v. Adams, 168 U. S. 618, 624, 18 Sup. Ct. 214, 216, 42 L. Ed. 602, seems prima facie to indicate that a paper serving the purpose of process from the federal court must always conform to section 911 (721), Rev. St., still the entire opinion is somewhat in confirmation of the opposite conclusion. It seems to give much weight to section 914 (724), Rev. St., and the inference is that, where there is no rule of the federal court on the subject a state statute authorizing a summons to be issued by plaintiff's attorney would control in the federal court. The prototype of section 911 (721) was enacted in 1789 (Act Sept. 29, 1789, c. 21; 1 Stat. 93. See also, Act May 8, 1792, c. 36; 1 Stat. 276); the conformity act (section 914 (724)) at a much later date (Act June 1, 1872, c. 255, 17 Stat. 197). The purpose of this later statute was to secure conformity in civil law causes, subject to a reasonable discretion in the federal courts, in matters of practice, pleading, and 'forms and modes of proceeding.' Where the state statute authorizes the plaintiff or the plaintiff's attorney to issue not a summons, but a notice, as a method of instituting a litigation, reasonably full effect is de-

nied the conformity statute, if we hark back to act of 1789 for authority for saying that such state statute does not govern in common-law civil causes in the federal courts of such state, in the absence of any rule of court on the subject.

"The motion of defendant is overruled." Leas & McVitty v. Merriman, 132 Fed. 510.

This case has never been overruled or disapproved by any court so far as we can find.

It was followed in Schofield v. Palmer, 134 Fed. 753; In Re: Condemnation Suits, 234 Fed. 443 and Eley v. Gamble, 75 F. (2d) 171. Cited with approval In Re: Pieris Irr. Dist. v. Turnbull, 215 Fed. 562 and In Re: Simon, 297 Fed. 942.

The notice of motion statute in Virginia has been construed on several occasions by the courts of this district and by the Circuit Court of Appeals of this district. See New River Mineral Company v. Roanoke Coal & Coke Co., 49 C. C. A. 78, 110 Fed. 343; Schoefield v. Palmer, 134 Fed. 753; Shugart v. Crews, 171 C. C. A. 72, 260 Fed. 36.

This decision of Judge McDowell has been relied on by the bench and bar in the State of Virginia for thirty years. To question it at this time would be to throw doubt upon the validity of probably more than fifty per cent of the recent judgments by default in the federal courts of Virginia.

It would also in effect so far as Virginia is concerned nullify the Conformity Act, section 724, because the lawyers of Virginia are familiar with the procedure by notice of motion and habitually use it. The fundamental purpose of 724 is to permit lawyers in the State to use the procedure with which they are familiar.

In a number of condemnation proceedings in the East-

ern District of Tennessee under section 724, they gave notice as provided by the state practice. Objection was made that they were void because process was not issued signed by the clerk and under the seal of the court. Judge Sanford, later Justice of the Supreme Court, said:

> "In several proceedings instituted by the United States and now pending in this court for condemnation of lands under the provisions of the Weeks Law of March 1, 1911, c. 186, 36 Stat. 961 (Comp. St. 1913, sec. 5174-5187), the United States Attorney and various counsel representing claimants to the land have informally requested the opinion of the court as to the validity of the proceedings, arising out of a doubt which has been suggested as the jurisdiction of the court by reason of the fact that no summons have been issued and served upon the owners of the land, but they have been brought before the court, if at all, by mere service of notice and publication as to nonresidents, in accordance with the provisions of the general statutes of Tennessee in reference to condemnation proceedings.
>
> "(1) The Act of August 1, 1888, c. 728, 25 St. 357, authorizing the condemnation of land by the United States for public uses by condemnation under judicial process is proceedings in the Circuit or District Courts of the district wherein such real estate is located, provided, in section 2, that:
>
> " 'The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of the court to the contrary notwithstanding.'
>
> "This provision as to conformity to the State practice is, it is to be noted, in substantially the same terms as the provisions of the general conformity statute, embodied in section 914 of the Revised Statutes (Comp. St. 1913, sec. 1537).

"The general statute of Tennessee in reference to the condemnation of land for railroads and other works of internal improvement, provide that the party seeking to appropriate such land shall file a petition therefor in the circuit court of the county in which the land lies (Tenn. Code 1858, sec. 1326; Shan. sec. 1845); that notice of this petition shall be given to the owner of the land, or if a nonresident of the county, to his agent, at least five days before its presentation (Code 1858, sec. 1327; Shan. sec. 1846); that if the owner is a nonresident of the state or unknown, notice shall be given by publication, as provided in the Code in similar cases in Chancery (Code, sec. 1328; Shan. sec. 1847); and that 'all parties having any interest in any way in such land may be made defendants, and the proceedings will only cover and affect the interest of those who are actually made parties.' (Code, sec. 1329; Shan. sec. 1848). This statute makes no provision for bringing the owners of the land before the court in any other way than by notice and publication, as above set forth, and does not provide for the issuance of process against them in the ordinary sense, such proceedings being under the State law an exception, by necessary inference, to the general statutory provision that all civil actions at law in courts of record, except as otherwise provided, shall be commenced by summons. Tenn. Code, Sec. 2813; Shan. sec. 4518. Thus in Camp v. Railroad, 11 Lea (Tenn.) 705, 706, it was held that condemnation proceedings based alone upon the statutory notice, without summons, were valid, and that the general Code provisions as to pleadings in actions at law did not apply to such statutory proceedings.

"The doubt which has been suggested as to the validity of these proceedings arises from the fact that section 911 (721) of the Revised Statutes (Comp. St. 1913, sec. 1534) provides that 'all writs and process issued from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof;' the suggestion being

that under this provision these proceedings should have been commenced by summons to the owners of the land, issued under the seal of the court and signed by the clerk.

"I think it entirely clear, both upon principle and under the authorities, that in any original suit in a Federal court which must be commenced by a summons or other process of the court itself, such process must be signed by the clerk and issued under the seal of the court, to be valid, regardless of any different provision as to the form of a summons in the State courts, the general conformity statute not operating to waive this specific requirement as to the process in the federal courts embodied in section 911 (721) of the Revised Statutes. Martin v. Criscuola, 10 Blatchf. 211, 16 Fed. Cas. 892; Peaslee v. Haberstro, 15 Blatchf. 472, 19 Fed. Cas. 71; Dwight v. Merritt (C. C.) 4 Fed. 614, 615; Middleton Paper Co. v. Paper Co. (C. C.) 19 Fed. 252, 253.

Preceding paragraph alone is quoted by petitioner, p. 16.

"After careful consideration, however, I conclude that the provisions of section 911 (721) only apply to writs and process issuing from the courts themselves, and not to notices given by the parties, which are not process of the court and not embraced within its terms, and hence that in any proceeding which may be properly instituted and proceeded with upon mere notice to the parties in interest, without process from the court itself, the requirements of section 911 (721) have no application. This is in accordance with the principle of Leas v. Merriman (C. C.) 132 Fed. 510, in which it was held that the provisions of sec. 911 (721) did not apply to a notice given under the Virginia Code authorizing a judgment on a contract to be obtained on motion after notice to the defendant and the practice thereunder by which notice was served on the defendant by the plaintiff or his attorney, such no-

tice not being a process from the court, and that under the general conformity statute an action might be instituted by such notice in the Federal court in Virginia in accordance with the State practice." In Re, Condemnation Suits by United States, Eastern District of Tenn. March 30, 1916; 234 Fed. 443.

We quote the syllabus of an earlier case:

"Process—What Constitutes—Notice of the Garnishment. Rev. St. sec. 915 gives plaintiff, in common law causes in the United States Circuit Court remedies by attachment or other process against the defendant's property, similar to those provided by the state statutes. Code Iowa sec. 2962, provides that the clerk shall issue the writ of attachment. Sec. 2967 provides that property of the defendant held by a third person may be attached by giving the latter notice of attachment. Sec. 2975 as amended by Laws 18th General Assembly, c. 58, provides that garnishment is effected by informing the supposed debtor that he is attached as garnishee, and leaving written notice not to pay any sum due, or deliver the property to defendant, etc., there is no provision in the Revised Statutes or Iowa Code requiring either of such notices to proceed from the clerk. Held, that a notice to the garnishee is not a 'process' within Rev. St. sec. 911, relating to process, and that such notice in actions in the United States Circuit Court in Iowa is properly signed by the marshal, and need not bear the seal of such court or the teste of the chief justice of the United States." Wile v. Cohn (1894), 63 Fed. 759 (Syllabus Cir. Ct. Iowa). Affirmed by the Circuit Court of Appeals, 70 Fed. 138, but without discussing the validity of garnishee summons. That point apparently was not raised in the Circuit Court of Appeals.

THIS PROCEDURE IN FEDERAL COURTS APPROVED BY TEXT WRITERS.

"Under the conformity act (Rev. Stat., sec. 914; U. S. Comp. Stat. 1901, p. 684) an action may be instituted

by notice under sec. 6046 in a Federal Court in Virginia in accordance with the State practice." Burks Pleading & Practice, Second Edition, p. 226.

"Interesting questions sometimes arise as to what is process within the meaning of this federal statute. Thus, is notice of motion for judgment, a practice obtaining in Virginia and many other states, process in this sense, so that it must conform to the federal statutory requirements? Judge McDowell, in a well considered opinion that is believed to be sound, has answered this question in the negative. And the same has been held as to notice given by the parties of the commencement of a proceeding for the condemnation of land." Dobie on Federal Procedure, p. 592.

"Action may be instituted by such notice (under Virginia Code, section 6046) in a Federal Court in Virginia in accordance with State practice." 4 Cyc. of Fed. Procedure, sec. 1203.

"Process included in the phrase 'modes of proceeding' used in the Conformity Act, and in the statute requiring that all writs and processes issuing from the federal courts shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof, in its narrowest sense means the writs and mandates of the court under the seal of the court, and so does not include mere notices of the parties given by the parties." 6 Hughes Fed. Practice 106, sec. 3584.

"Those (process) issuing from the Supreme Court must bear teste of Chief Justice of the United States, or, when that office is vacant, of the Associate Justice next in precedence; and those issuing from the District Court bear teste of the judge, or when that office is vacant, of the clerk thereof. They must be signed by the clerk of the court, from which they issue. In this connection 'process' means the writ and mandate under the seal of the court, and does not refer to notices given by the parties, which are not the court's process." 6 Hughes Fed. Practice 325, sec. 3787.

STATE CASES HOLDING NOTICES NOT WRITS.

There are numerous state decisions that statutory and constitutional provisions which require process to be signed and sealed by the clerk or issued in the name of the state such as U. S. Code, sec. 721 and Va. Constitution, sec. 106 and have no application whatever to citations or notices given by parties or their attorneys similar to those given under section 6046 of Virginia Code. Some of the state decisions are as follows:

"A summons is not a process—it is a mere statutory notice. Rahn v. Cunnison, 12 Wis. 528. The summons in this case was regular, in every way except for not being signed by Wisconsin attorneys with their address specified." Hammond-Chandler Lumber Co. v. Industrial Commission (1916) 158 N. W. 292, 294, 163 Wis. 596.

"As to the first point raised that the summons is such a process as must be issued in the name of the people of the State of Colorado, we are strongly inclined to follow the conclusion of the supreme court of Florida in Gilmer v. Byrd, 15 Fla. 411. In this case the identical question here presented is discussed at some length — that is, that the summons, as authorized by the Code is a 'process' within the meaning of the constitutional provisions which require the style of all process to be the 'State of Florida;' that the summons had no style; that this was essential to the validity of the judgment, there having been no appearance. And the Court said: 'But is a notice given by an attorney of the institution of a suit in a form similar to a summons but not issuing out of a court, a "process" within the meaning of the constitution?' Baron Comyn in giving the definition of the term 'process' says it imports the writs which issue out of any court to bring the party to answer, or for doing execution. There is no definition of 'process' given by any accepted authority which implies that any writ or method by which a

suit is commenced is necessarily 'process.' A party is entitled to notice and to a hearing under the constitution before he can be affected but it is nowhere declared or required that that notice shall be only a writ issuing out of a court. 'In Porter v. Vandercook, 11 Wis. 70, it was held that "the summons provided for by the Code is not a 'writ' or 'process' within the meaning of the constitution, art. 7, sec. 17," and need not be in the "name of Wisconsin" nor tested in the name of the presiding judge, nor sealed with the seal of the court.' In Hanna v. Russell, 12 Minn. 80 (Gil. 43) the Court said: 'But we think a "summons" is not "process" with the meaning of sec. 14, art. 6 of our State Constitution. It is merely a notice given by plaintiff's attorney to the defendant that proceedings have been instituted and judgment will be taken against him if he fail to defend. This notice is not issued out of or under the seal of the court, or by authority of the court or any judicial officer. The fact that the court acquires jurisdiction by its service does not prove it "process" for it is competent for the legislature to provide that the court shall acquire jurisdiction by the service of the complainant without a summons, or in any other manner by which the defendant may be notified that proceedings have been instituted against him.' Bailey v. Williams, 6 Or. 71, it was held that 'a summons used to bring a defendant into the circuit court is not "process" and need not run in the name of the state.' In Nichols v. Plank Road Co., 4 G. Greene, 44, it was held that 'the notice provided by the Code is not a "process" and need not be in the style of the "State of Iowa."' This seems to be the generally accepted conclusion of all courts having a similar Code practice and a similar provision in the constitution, and is, in our judgment a satisfactory determination of this question." Comet Consolidated Min. Co. v. Frost (1890) 25 Pac. 506, 507, 15 Colo. 310.

"A summons issued by the plaintiff or his attorney in an action instituted in a court of record in Oregon is

not a 'process' within the meaning of that word as used in our Code. L. O. L. sec. 1368; Bailey v. Williams, 6 Or. 71; Whitney v. Blackburn, 17 Or. 564, 21 Pac. 874, 11 Am. St. Rep. 857, 862.

"The cases thus relied upon are not controlling in Oregon where a summons issued in an action instituted in a court of record is not process, nor more than a mere notice to the defendant upon whom it is served." Lane v. Ball (1916) 160 Pac. 144, 148, 149, 83 Or. 404 (Sup. Ct. Ore. 1916).

"Two other questions are urged by respondents (a) that the Court did not acquire jurisdiction; and (b) that the notice was insufficient.

"As to the first it was urged that since the notice to respondents did not run in the name of the State of Washington, and that by Article 4, sec. 27 of the State Constitution, all process is required to be in the name of the State of Washington the notice was ineffectual to give jurisdiction. An elaborate argument on this point is pressed upon us to show that the notice herein is process within the meaning of the Constitution. But we think it unnecessary to enter into a review of the question, since we have heretofore held that a summons in a civil action is not process, and we think the notice given herein stands on no higher plane. Wagnitz v. Ritter, 31 Wash. 343, 71 Pac. 1035; Spokane Merchants Assn. v. Acord, 99 Wash. 674, 170 Pac. 329, 6 A. L. R. 835; St. ex rel. Hazen v. Superior Court (Wash.) 247 Pac. 942." State v. Superior Ct., 253 Pac. 115, 119, 142 Wash. 270 (1927).

"Besides, citation is not 'process' within the intendment of said article of the Constitution. Bludworth v. Sompeyrac, 3 Mart. (O. S.) 719." Herndon v. Wakefield-Moore Realty Co., 79 So. 318, 319 (1918) 143 La. 724.

Note: This was the commencement of a condemnation proceeding where it was claimed the citation did not conform to the requirements for process.

"In some States the original summons to the defendant in an action is a mere notice by the plaintiff's attorney; and hence is not process in the sense of constitutional or statutory provisions prescribing the style and requisites of process.

"But we think a summons is not process within the meaning of section 17, art. 3, of our State Constitution. It is merely a notice given by the plaintiff's attorney to the defendant that proceedings have been instituted, and judgment will be taken against him if he fails to defend. This notice is not issued out of or under the seal of the court, or by the authority of the court, or any judicial officer. The fact that the court acquires jurisdiction by its service does not prove it process, for it is competent for the Legislature to provide that the court shall acquire jurisdiction by the service of the complaint without a summons, or in any other manner by which the defendant may be notified that proceedings have been instituted against him. 'Process, in a large acceptation, is nearly synonymous with proceedings, and means the entire proceedings in an action from the beginning to the end. In a stricter sense it is applied to the several judicial writs issued in an action. 7 Comyn's Dig. 120; 3 Black. Com. 279 et seq.; Bouvier's Law Dic. In this last sense it is manifestly used in the Constitution and, when used in this sense, we believe it only applies to judicial instruments issued by a court or other competent jurisdiction and returnable to the same.' Hanna et al. v. Russell et al., 12 Minn. 80 (Gil. 43). The meaning of the Constitution of Illinois, which provides that all process shall run in the name of 'The People of the state of Illinois,' is thus explained. 'This object is manifest. It was to provide a name or title by which the sovereign power of the state should be designated. In England the king is supposed to be the fountain of justice and the source of power, and that sovereign power is there designated by his name and title. In Kentucky, and some of the other states, it is the 'commonwealth,'

in Missouri and some others it is the 'State.' Here it is the 'People,' etc. Where, by the law of England, whence we have mainly borrowed our system of jurisprudence, writs or process are issued, or other proceedings are had expressly in the name of the king, here they should run in the name of 'The People.' The latter is to be used instead of the former. The meaning is not that everything shall be done expressly in the name of 'The People' but that nothing shall be done in any other name. Whenever the name of the sovereign power is invoked or expressed, that shall be its designation.' Curry v. Hinman, 11 Ill. 420. See also, Leas & McVitty v. Merriman (C. C.) 132 Fed. 510; Gilmer v. Bird, 15 Fla. 410; William Tweed v. Horace Metcalf, 4 Mich. 579; Case Mfg. Co. v. Perkins, 106 Mich. 349, 64 N. W. 201; Plano Mfg. Co. v. Kaufert, 86 Minn. 13, 89 N. W. 1124; Brooks v. Nickel Syndicate, 24 Nev. 311, 53 Pac. 597; Bailey v. Williams, 6 Or. 71; Town of Davis v. Davis, 40 W. Va. 464, 21 S. E. 906; Porter v. Vandercook and others, 11 Wis. 70." McKenna v. Cooper, 101 Pac. 662, 663, 79 Kan. 847 (1909).

"In this case the identical question here presented is discussed at some length—that is, 'that the summons, as authorized by the Code, is a 'process,' within the meaning of the constitutional provisions which require the style of all process to be, the 'State of Florida;' that the summons had no such style; that this was essential to the validity of the judgment, there having been no appearance,' and the court said: 'But is a notice given by an attorney of the institution of a suit, in a form similar to a summons, but not issuing out of a court, a 'process' within the meaning of the constitution? Baron Comyn, in giving the definition of the term 'process' says it imports the writs which issue out of any court to bring the party to answer, or for doing execution. There is no definition of 'process' given by any accepted authority, which implies that any writ or method by which a suit is commenced is

necessarily 'process.' A party is entitled to notice and to a hearing, under the constitution, before he can be affected, but it nowhere declared or required that the notice shall be only a writ issuing out of a court. Mining Co. v. Frost, 25 Pac. 506; Hanna v. Russell, 12 Minn. 80 (Gil. 43); Bailey v. Williams, 6 Or. 71; Nickols v. Plank-Road Co., 4 G. Greene, 44." Brooks v. Nevada Nickel Syndicate (1898) 53 Pac. 597, 599, 24 Nev. 264.

"As was stated at the outset, this summons was signed by the attorney, as permitted by the statute, and thereby F. C. Erdman was given notice of the pendency of the suit. The notice accomplished its purpose, and brought the right man into court, who moved to quash it. There is no question concerning the right to amend a writ because a summons signed by an attorney is not a process, but a notice under the code, or a proceeding, as perhaps it might be more accurately termed, whereby the person who is named as a defendant is brought into court to defend the action. Mining Co. v. Frost, 15 Colo. 310, 25 Pac. 506." Erdman et al. v. Hardesty, 60 Pac. 360, 361, 14 Colo. App. 395 (1900).

"Writs are issued by the court through the clerk. Orders to show cause, under our practice, are signed by the judge. This order was signed by the judge. The practice in this state has long been established, and justifies the initiations of the proceeding through an order to show cause of the character of the one here involved. Such orders to show cause have been issued repeatedly by this court in various special proceedings, and have, so far as we are aware, never run in the name or style of the state of North Dakota. When writs have been issued, they have been issued by the clerk upon the order of the court; but orders to show cause have invariably been signed by a member of the court. It is true the order to show cause often contains some of the same provisions found in an alternative writ, but ordinarily an order to show cause is only another name for a notice and another method of submitting a

motion; and section 7825, supra, clearly contemplates the application being made upon notice, when a peremptory writ is sought in the first instance. Such notice may be given by means of the simple notice signed by counsel, or through the agency of an order to show cause, issued by the court or a judge. This is a combined notice and motion. The works on the subject all seem to contemplate application for the writ, either by notice or by order to show cause, and none of the approved forms of an order to show cause that we find contain the greeting which respondent contends is essential to jurisdiction. See the title 'Writ of Prohibition,' 14 Enc. of Forms, 987; Writ of Mandamus, 13 Enc. of Forms, 767, 13 Enc. of Pl. & Pr. 767." No. Pac. Ry. Co. v. Jurgenson (1913) 141 N. W. 70, 71, 25 N. D. 14.

"It is contended the published order for constructive process is void because it did not run in the name of the state of Florida.

"Section 37 of article 5 of the Constitution, providing that, 'The style of all process shall be the State of Florida' and section 4230 (2590). Compiled General Laws of Florida 1927, providing that, 'All process shall run in the name of the State of Florida,' have reference to 'process' as used in the restricted sense, and have reference only to that character of process which under the common law would run in the name of the king, and have no application to statutes providing for constructive service in chancery. Burns v. Pittsburg Mortg. Inv. Co., 105 Okla. 150, 231 Pac. 887; McKenna v. Cooper, 79 Kan. 847, 101 Pac. 662; Herndon v. Wakefield-Moore Realty Co., 143 La. 724, 79 So. 318; Curry v. Hinman, 11 Ill. 420; In re Abraham Bininger, 7 Blatchf. 262, text 274 (2d Cir.) Gilmer v. Bird, 15 Fla. 410; 20 Ency. Pl. & Pr. 1116." Gautier Properties v. The Biscayne Trust Co. (1930) 129 So. 848, 849.

"Again, it is contended that both the Missouri and Kansas divorces are void because the publication notices

did not run in the name of the state. The same contention was made in McKenna v. Cooper, 79 Kan. 847, 101 Pac. 662, but not sustained. That decision is adhered to. The same rule appears to prevail in Missouri. Hansford v. Hansford, 34 Mo. App. 262. See also, Doan et al. v. Boley et al., 38 Mo. 449." Gordon v. Munn (1912), 125 Pac. 1, 3, 87 Kan. 642.

"But we think a summons is not process within the meaning of section 14, article 6 of our state constitution. It is merely a notice given by the plaintiff's attorney to the defendant that proceedings have been instituted and judgment will be taken against him if he fails to defend. This notice is not issued out of or under the seal of the court, or by the authority of the court or any judicial officer. The fact that the court acquires jurisdiction by its service does not prove it process, for it is competent for the legislature to provide that the court shall acquire jurisdiction by the service of the complaint without a summons, or in any other manner by which the defendant may be notified that proceedings have been instituted against him. 'Process' in a large acceptation, is nearly synonymous with 'proceedings,' and means the entire proceedings in an action from the beginning to the end. In a stricter sense it is applied to the several judicial writs issued in an action. 7 Comyn, Dig. 120; 3 Bl. Comm. 279 et seq.; Bouvier, Law Dict. In this last sense it is manifestly used in the constitution, and when used in this sense we believe it only applies to judicial instruments issued by a court or other competent jurisdiction and returnable to the same. A summons, in our practice, therefore, we think, is not, in a strict or proper sense, or in the sense in which the word is used in the constitution, process." Hanna v. Russell, 12 Minn. Rep. 43, 45 (1882).

"It is further contended that the notice is void for the reason that it does not run in the name of the state of Oklahoma. Section 19, art. 7, of the Constitution pro-

vides that 'The style of all writs and processes shall be "The State of Oklahoma." Section 862, Comp. Laws 1921, provides: "The style of all process shall be the 'The State of Oklahoma,' " etc. But manifestly, process as used in the Constitution and statute is in the restricted sense, and has reference only to that character of process which under the common law would run in the name of the king. 20 Ency. Pl. & Pr.; McKenna et ux v. Cooper, 79 Kan. 847, 101 P. 662." Burns v. Pittsburg Mortgage Inv. Co. (1924) 231 Pac. 887, 889, 105 Okla. 150.

"Section 9 of the Declaration of Rights, contained in the Constitution of this State, provides that no person, shall be deprived of life, liberty or property without due process of law. Section 2 of Article 6 of the Constitution provides that 'the style of all process shall be "The State of Florida." The term, process, as used in these two sections, has not the same signification. In the first it is used in a large and comprehensive sense. In the second it is used in its most restricted and limited sense. Says Baron Comyn, "Process, in a large acceptance, comprehends the whole proceeding after the original and before judgment, but generally it imports the writs which issue out of any court to bring the party to answer, or for doing execution and all process out of the King's courts, ought to be in the name of the King. It is called process because it proceeds or goes out upon former matter, either original or judicial."' . . .

"This clause does not prohibit the Legislature from establishing a general rule of practice by which notice of the institution of an action may be given by an attorney or party. It has never received such a construction by the courts. Where such an enactment is general and applies to all actions and to all individuals, as is the case of the Code, such notice by an attorney is in conformity to the law of the land, and a judgment depriving a party of his property after such notice is, in contemplation of law, a deprivation by

due process of law. Whether the notice given by the attorney be process or not, it is, for the reasons given, within the power of the Legislature so far as this clause is a limitation, to authorize notice to be given in this manner. . . .

"But is a notice given by an attorney of the institution of a suit in a form similar to a summons, but not issuing out of a court, a process within the meaning of the Constitution? Baron Comyn, in giving the definition of the term process, says it imports the writs which issue out of any court to bring the party to answer or for doing execution. There is no definition of process given by any accepted authority which implies that any writ, or method by which a suit is commenced is necessarily process. A party is entitled to notice and to a hearing under the Constitution before he can be affected, but it is nowhere declared or required that that notice shall be only a writ issuing out of a court.

"In the States in which has existed a Code similar to the one under which this action was brought, we find the courts of last resort holding that such notice or summons need not be entitled or styled in the name of the State, although the constitutional requirement is substantially the same as ours in regulating the style of process. 12 Wis. 529; 4 Iowa 43; 4 Mich. 588; 3 Penn. 99; 12 Min. 86." Gilmer v. Bird, 15 Fla. 410, 421, 422, 423 (1875).

"It is objected that the court refused to dismiss the proceedings on the ground of defective notice. The first defect urged is that the notice does not run in the name of the state of Iowa, as required by the Constitution. This court has decided in former cases that the notice provided by the Code is not a 'process,' as contemplated by the Constitution, and that it need not be in 'the style' of 'the State of Iowa.'" Nichols v. Burlington and Louisa County Plank Road Co. (1853) 5 Iowa (4 Greene) 42, 43.

"The action was commenced in June, 1859. The summons was signed by the respondent's attorney, and required the appellants to answer within twenty days, etc. The objections taken to the summons were: That it does not run in the name of 'The State of Wisconsin;' is not sealed with the seal of the court; is not properly tested in the name of the presiding judge; and does not give the appellants ninety days to answer, but requires them to answer within twenty days.

"When the nature and office of a summons are considered, as indicated by the code of procedure, which code is incorporated in, and becomes a part of our present Revised Statutes, we are clearly of the opinion that it cannot properly be said to be a 'writ' or 'process,' within the meaning of chapter 136, Revised Statutes, and of section 17, article VII, of the Constitution. And it is quite evident that the legislature must have taken the same view of the matter, not regarding a summons as a 'writ' or 'process' within the constitutional meaning of those terms, or it would not have passed the sections of chapter 124 relating to it; for by the provisions of that chapter, it is expressly declared that an action may be commenced by service of summons with or without seal, which summons shall be subscribed by the plaintiff or his attorney, etc. It is not required to be issued out of a court of record, to be sealed with the seal of the court, and tested in the name of the presiding judge, as the writs contemplated by chapter 136, must be." Porter v. Vandercook et als. (1860) 11 Wis. 70.

"On the same day that the petition was filed in the district court the court ordered the publication of the notice required by section 5 of the act, hereinbefore quoted. The notice was duly published. It was not given in the name of the people and this fact gave rise to the second contention of plaintiff, namely, that the notice is a 'process' within the meaning of section 30 of Article 6 of the Constitution of the State of Colorado which provides that 'all process shall run in the

name of the "People of the State of Colorado,"' and that therefore the notice was void. This contention cannot be sustained, for we hold that the notice in question was not a 'process' within the meaning of the constitutional provision cited, and was not, therefore vitiated by the fact that it did not run in the name of the People." (Here follow authorities to sustain the holding). People v. Lee, 213 Pac. 583, 586, 72 Colo. 598.

"In further support of the contention that county court 'process' should be served in the same manner as district court process, plaintiffs cite section 1086, C. O. S. 1921, which provides: 'All process issued by the county court shall be served in the same manner, and by the persons and officers as provided for the service of process of the district court with the same fees.' Is service of such an order service of 'process,' and is there a distinction between 'process' and notice required in probate proceedings? Section 862, C. O. S. 1921, provides: 'The style of all process shall be: "'The State of Oklahoma.'" It shall be under the seal of the court from whence the same shall issue, shall be signed by the Clerk, and dated the day it is issued.' A guardian's sale is a special proceeding under articles 7 and 8, chapter 5 C. O. S. 1921, (sections 1232-1305) and is not a cause of action under sec. 172, C. O. S. 1921. The orders of the court on a hearing of a petition in a sale proceeding are not required to run in the name of the state; they are not required to be under the seal of the court; and they are not required to be signed by the clerk." Harrison v. Orwig, 299 Pac. 143, 147 (Sup. Ct. Okla. 1931).

"This is an appeal from an order of the district court of Carter county reviving a judgment theretofore rendered against the plaintiff in error in favor of the defendant in error. Hereinafter the plaintiff in error will be referred to as the defendant and the defendant in error as the plaintiff.

"(1) The first assignment of error is that the trial court

erred in overruling the defendant's motion to quash the notice. The only objection made to that notice is that it did not run in the name of the State of Oklahoma.

"Section 19, article 7, of the Constitution of Oklahoma, provides '. . . The style of all writs and processes shall be " 'The State of Oklahoma' . . .'"

"Section 19, O. S. 1931, provides: 'The style of all process shall be " 'The state of Oklahoma' ". It shall be under the seal of the court from whence the same shall issue, shall be signed by the clerk, and dated the day it is issued.'

"The notice complained of is not a writ or process within the meaning of section 19, art. 7, of the Constitution, or section 19, O. S. 1931. Burns v. Pittsburg Mortgage Inv. Co., 105 Okl. 150, 231 P. 887; Harmon v. Nofire et al, 131 Okl. 1, 267 P. 650; Emerson v. Emerson, 130 Okl. 140, 265 P. 1078; and Armstrong v. Phillips, et al., 82 Okl. 82, 198 P. 499. When a sufficient notice was duly served on the defendant by the sheriff, the court acquired jurisdiction. Section 263, O. S. 1931; section 578, O. S. 1931." Dunlap v. Bull Head Oil Co., 29 Pac. Rep. (2d) 108, 109. (Supreme Court of Oklahoma, 1934).

"In summary proceedings by notice and motion against Bank debtors, the notice serves the double purpose of a writ and declaration, and prevents the statute of limitations from creating a bar, although the motion for judgment is afterwards delayed." Stanley v. Bank of Mobile, 23 Ala. 652 (2nd paragraph of syllabus).

CONFORMITY ACT CONTROLS PROCEDURE.

This point is well expressed by Mr. Justice Roberts in the recent case of Burns Mortgage Co. v. Fried, 292 U. S. 487, 54 S. Ct. 813, where he said on page 492:

"The Conformity Act required the trial court to apply

the local law in matters of procedure. The form of action and the right in which it must be brought were therefore governed by the Pennsylvania practice."

Petitioners in their behalf, pages 6-10, argue that the Conformity Act does not apply. They cite cases holding that where the federal law creates a new cause of action and prescribes a new and wholly statutory procedure to enforce it, and gives exclusive jurisdiction to the federal courts the Conformity Act does not apply. Coffey v. U. S., 117 U. S., p. 233, 68 S. Ct. 717, 29 L. Ed. 849, cited by petitioners is a case involving an in rem proceeding, to enforce the forfeiture of property for violation of the revenue law. The court held that the Conformity Act applied only to in personam proceedings, and not to in rem proceedings. U. S. v. The Southern Dredging Company, 251 Federal 400, referred to a proceeding within the exclusive jurisdiction of the federal court and it was "a wholly statutory procedure."

Dwight v. Merrit, 4 Fed. 614, merely held that a summons must be signed and sealed by the clerk of the court. Aetna Insurance Company v. Hallock (Aetna Insurance Co. v. Doe), 6 Wallace 556, 18 L. Ed. 948, held that an order of foreclosure of sale in a state court void for not conforming to the State statute.

Middleton Paper Company v. Rock River Paper Co., 19 Fed. 252, held that a garnishment summons cannot be signed by the attorney.

U. S., etc. v. Bolt Harbor Marine Railway Company, Inc., 58 Fed. 2d, 366, held that the Conformity Act did not apply where jurisdiction was given exclusively to the federal court. This case was decided by Judge Way, who presided in the district court at the trial of this action. He saw no conflict between the decision in this case and the ruling in that. U. S. v. Moore, 287 Fed., p. 879,

was a contempt proceeding arising in bankruptcy. The court held that as the state courts had no jurisdiction in bankruptcy matters, the Conformity Act did not apply. The sole question discussed in the circuit court of appeals was whether a habeas corpus or a petition to review was proper. Habeas corpus had been brought and the court held it was the wrong form of procedure.

U. S. v. 50 Boxes, etc., of Lace, 92 Fed. 601, was a proceeding to forfeit under the federal law of which the federal courts had exclusive jurisdiction. It was a quasi criminal in its nature. Held the Conformity Act did not apply.

No case, state or federal, has been cited by petitioners or found by us, holding that the state courts are without jurisdiction to enforce an assessment levied on national bank stock by the Comptroller of Currency. Such actions have been repeatedly brought in the state courts for many years.

Matteson v. Dent, 176 U. S. 521, 20 S. Ct. 419, 442, was such an action originally brought in the State Court of Ramsey County, Minnesota, and afterwards heard by the Supreme Court of Minnesota, 70 Minn. 519, and finally taken up to the United States Supreme Court. The jurisdiction of the state court appears not to have been questioned.

The jurisdiction of the state court was questioned in the case of McCormick v. Smith, 23 Ida. 487, 130 Pac. 999. It was there expressly held the state courts had concurrent jurisdiction with the federal courts in the enforcement of such liability.

The following were actions in state courts to enforce such liability:

O'Conner v. Witherby, 111 Cal. 523, 44 P. 227; Hale v. Walker, 31 Iowa 344; Davis v. Essex Baptist Society,

44 Con. 582; Laing v. Burley, 101 Ill. 591; Graham v. Platt, 65 P. 30, 28 Colo. 421; Cox v. Elmendorf, 37 S. W. 387, 97 Tenn. 518; Clark v. Ogilvie, 63 S. W. 429, 111 Ky. 181; Kerr v. Urie, 37 A. 789, 86 Md. 72; McGruder v. Colston, 44 Md. 349; Aspey v. Whittemore, 85 N. E. 91, 199 Mass. 65; Davis Estate v. Watkins, 76 N. W. 575, 56 Neb. 288; King v. Armstrong, 34 N. E. 163, 50 Ohio State 222; First National Bank v. Riggins, 32 S. E. 801, 124 N. C. 534; Schaberg's Estate v. McDonald, 83 N. W. 737, 64 Neb. 493.

Where the federal law creates a cause of action and does not limit such actions to the federal courts, it can be enforced in state courts.

"Statutes have no extra-territorial operation, and the courts of one government cannot enforce the penal laws of another. At one time there was some question both as to the duty and power to try civil cases arising solely under the statutes of another State. But it is now recognized that the jurisdiction of state courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the State in which the suit is brought. Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the Federal and the state Government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by Federal statute. Robb v. Connolly, 111 U. S. 624, 637.

"On the contrary, the absence of such provision would

be construed as recognizing that where the cause of action was not penal, but civil and transitory, it was to be subject to the principles governing that class of cases, and might be asserted in a state court as well as in those of the United States." Galveston H. & S. A. Ry. Co. v. Wallace, 223 U. S. 481, 490, 32 S. Ct. 205, 56 L. Ed. 516.

"Congress created the right of action. (Carmack Amend.) It might have provided that the right shall be enforceable only in a federal court. It might have provided that state courts shall have concurrent jurisdiction only of those cases which, by the applicable federal law, could, under the same circumstances, have been commenced in a federal court for the particular state. But Congress did neither of these things. It dealt solely with the substantive law. As it made no provision concerning the remedy, the federal and state courts have concurrent jurisdiction. Galveston, etc. Ry. Co. v. Wallace, 223 U. S. 481, 490, 32 S. Ct. 205, 56 L. Ed. 516. The federal right is enforceable in a state court whenever its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws. Second Employers' Liability Cases, 223 U. S. 1, 56, 57, 32 S. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Claflin v. Houseman, 93 U. S. 130, 136, 137, 23 L. Ed. 833." State of Missouri, etc. v. Taylor, 266 U. S. 200, 208, 45 S. Ct. 48, 45 S. Ct. 47.

No case has been cited by petitioners, or found by us, holding that the Conformity Act does not apply to an action at law to enforce a stock assessment.

DISCUSSION OF PETITIONERS' POSITION AND AUTHORITIES.

Section I, pages 6 to 10 of their brief discussing the Conformity Act is replied to on pages 50 to 53 of this brief.

Section II, pages 10 to 11, is irrelevant because it deals

with matters other than the jurisdiction of the District Court to which the certiorari limited the appeal.

Section III, pages 11 to 17, where it is argued that a notice of motion for judgment is a writ or process, we will discuss in detail.

We take issue with the first statement of this section. We have seen no case and no case is cited by the petitioners holding that a notice of motion issued and signed solely by the plaintiff for the purpose of instituting an action in a district court of the United States is process within the meaning of Section 721 of Title 28 of the United States Code and to be valid has to be under the seal of the district court signed by the clerk and bear the teste of the district judge.

The complaint, motion, declaration or other statement of the plaintiffs' cause of action against the defendant, is as far as we know, always signed by the plaintiff or his attorney. The Virginia Code (Section 6046), and that of some of the other states provides for service of this motion for judgment, with a named date when judgment will be taken, unless the defendant oppose the motion. This sort of a motion, with a notice of the date when the motion for judgment will be made, has never by any federal court been held to be a process under Section 721, nor to be a writ or process under Section 106 of the Virginia Constitution, or like section of any other state constitution.

We will now review petitioners' authorities on this subject.

We have been unable to locate Rose's Code of Federal Procedure. There is certainly nothing about the Virginia practice in the quotation. It relates solely to a summons or process. Whether in some other section there is a discussion of the Virginia practice of moving for a judg-

ment we have been unable to determine or whether this quotation is from the latest edition.

The case of Peaslee v. Haberstro, Federal Case No. 10884, was decided by the New York District Court in 1879, without citation of authority. The form of the summons used in that case is not given. It was certainly not a notice of motion.

Dwight v. Merrit (Cir. Ct. N. Y. 1880), 4 Fed. 614, the paper discussed was a summons and not a notice of motion. The court merely followed the earlier case of Peaslee v. Haberstro.

Johnson v. Healy, Federal Case No. 7389 (N. Y. D. C. 1878), held a summons signed by the clerk good, the court saying:

> "The Supreme Court of the United States in construing the provision of Section 914 of the Revised Statutes—Section 5, Act June 1, 1872, (17 Stat. 197)—in Indianapolis R. Co. v. Horst, 93 U. S. 291, say that the conformity required by the statute is required to be 'as near as may be' not 'as near as possible' or as 'near as may be practicable', and that 'this indefiniteness' devolves on the judges the duty of construing and deciding and gives them the power to reject any subordinate provision in the State statute 'which in their judgment would unwisely encumber the administration of law or tend to defeat the ends of justice in their tribunals.' Unquestionably, where a process or pleading is substantially in compliance with the requirements of the Code of the state, especially where to set it aside would tend to defeat the ends of justice, it ought to be upheld. Lewis v. Gould, Case No. 8324."

U. S. v. Mitchell, 223 Fed. 805 (N. Y. Dist. Ct. 1915), involved not the validity of the summons—that was merely brought in by way of dictum—but the entire case turned on the validity of the service of the summons, which was

not served by the marshal. This was the only point in the case.

Middleton Paper Co. v. Rock Paper Co., 19 Fed. 252 (Wis. C. C. 1884), held that a garnishee summons could not be signed by the attorney. It is in conflict with the opinion of Wile v. Cohn (1894), 63 Fed. 759. See page 35 of this brief.

In Re: Condemnation Suits, 234 Fed. 443. The quotation in that case is incomplete and in its incomplete form it is misleading. A fuller quotation is given on pages 32 to 34 of our brief and shows the case to be very favorable to our contention.

Cooper v. Reynolds, 10 Wall. 308, Boswell v. Otis, 9 How. 336, and Pennoyer v. Neff, 95 U. S. 714, have no bearing on the subject.

It will be observed that petitioners have no cases, even apparently on this subject, except four from the circuit and district Courts of New York and Wisconsin, and that the latest decision is in 1884, twenty years before the decision of Judge McDowell in Lees & McVitty v. Merriman, 132 Fed. 510, which is the leading case of the federal authorities on which we rely.

The first of these cases, Peaslee v. Haberstro did not examine the statutes carefully. It assumed that a summons or process returned to a court was the same as one issuing from a court. This is a very important distinction because Section 721 has nothing to say about notices or anything else which may be substituted for process and returned to court. It applies entirely to processes issuing from the courts. This distinction has not only been observed in the subsequent cases but it had been brought out many years before in the state cases. This case entirely ignored such earlier cases as Gilmer v. Bird, 15 Fla. 410 (1875); Nichols v. Burlington & Louisa County

Plank Road, 5 Iowa (4 Greene) 42, (1853); Porter v. Vandercook, 11 Wis. 70 (1860), and others. See pages 37 to 49 of this brief.

The three remaining cases, all district and circuit court decisions blindly followed this or each other, in no way referring to the numerous earlier State cases and wholly failing to observe that Section 721 was confined to process issuing from courts and like the sections in the state constitution had no application to notices returnable to courts.

These four cases do not appear since 1884 to have been followed anywhere. If they have been referred to it has usually been to distinguish them. They were mentioned in a dictum, in U. S. v. Mitchell, 223 Fed. 805, by the New York District Court in 1915.

Much of the administration in federal courts is regularly based on notices which are not process. Hughes Federal Practice gives many forms to be signed by the plaintiff or his attorney and addressed to the defendant or his attorney which are presumably serviceable by the marshal. He says that proof of service may be by the marshal's return, Vol 12, Section 8447. Among his sections are the following: 8147, 8427, 8428, 8453, 8461, 8463, 8468, 8469, 10075, 10366, 10419, 10511, 11100, 11101, 11102, 12511, 12589, 12706, 13243, 13524, 13545, 14822, 16732, 16733, 18093, 18233.

Petitioners' title "Notice of Motion Is Process." The first authority cited under this is Hughes Federal Procedure (2d). This is the old one volume Horn Book Issue. It has been revised, enlarged and corrected in his latest edition, 6 Hughes Fed. Practice 325, Sec. 3787. Petitioners were evidently familiar with this work, for the next quotation is from the latest 16 volume edition. This second quotation from Section 3584 is incomplete.

It should have included that part of the section quoted on page 36 of our brief, to the effect that Section 721 does not apply to notices of the parties given by the parties.

The last case cited, Virginia Hot Springs Co. v. Schreck, 131 Va. 581, 109 S. E. 595, holds that the notice of motion is not a writ, but takes the place of a writ and declaration.

Title IV of petitioners' brief, pages 19 and 20, contends that as Section 503 of Title 28 does not require the marshal to serve a notice of motion, his service is void. There is certainly no citation of authorities to show that it was illegal for the marshal to serve the notice. There is also no citation of authorities to show that it was necessary for the marshal to serve the notice. Virginia Code, Section 6041 provides that a notice which has reached its destination in time, though not served is good. U. S. v. Mitchell, 223 Fed. 805 quoted from on page 15 of petitioners' brief, held that process not served by the marshal was valid in a federal court under the Conformity Act, if served in accordance with a state practice. In that case the Court said "But no federal statute requires that all process shall be directed to the marshal."

Appendix. Why the Rule of Practice in the Eastern District was copied at page 20 we do not know. Judge Luther B. Way, who wrote the rule held that it did not prevent the use of the notice of motion in this case. This construction of the Rule was approved by the Circuit Court of Appeals in this case and in Eley v. Gamble, 75 Fed. (2d) 171, Section 724 of Title 28. The Conformity Act, after providing for conformity reads: "Any rule of court to the contrary notwithstanding."

CONCLUSION.

The writ was inadvertently awarded as to T. S. Winston and should be dismissed as to him and execution is-

sued against him and his surety, John R. Morris forthwith.

It is also respectfully submitted that under the Conformity Act it was proper to file a proceeding by notice of motion, that the notice not being a writ issuing out of court does not have to be signed or sealed by the clerk as writs issuing out of a court have to be under section 721 of the Judicial Code of the United States. The decisions of the District and Circuit Court of Appeals were right and should be affirmed.

Respectfully submitted,

MURRAY M. MCGUIRE,
JOHN S. EGGLESTON,
GEORGE GILMER,
Attorneys for Respondent.

GEORGE P. BARSE,
J. H. BREWER, JR.,
Of Counsel.

"Remedy by motion after fifteen days' notice, in lieu of action at law; when notice to be returned to clerk's office; rules applicable to . . . Any person entitled to maintain an action at law may, in lieu of such action at law, proceed by motion, before any court which would have jurisdiction of such action, after not less than fifteen days' notice, which notice shall be in writing, signed by the plaintiff or his attorney, and shall be returned to the clerk's office of such court, within five days after service of same, and when so returned shall be forthwith filed and the date noted thereon, and shall be docketed on the return day thereof. But the notice shall not be sent out of the county or city in which the judgment is to be asked, except in those cases in which process can be so sent out under the provisions of section six thousand and fifty-five and six thousand and fifty-six. The return day of a notice under this section shall not be more than ninety days from its date, unless the commencement of the next succeeding term of court be more than ninety days from such date, in which case the return day may be some day of such term.

"The defendant may make the same defenses to the notices, as to a declaration in any action at law, and in the same manner, or he may state his grounds of defense informally in writing, and in the latter event the parties shall be deemed to be at issue on the grounds stated without replication or other pleading on the part of the plaintiff. No plea in abatement under this section shall be received after the defendant has demurred, pleaded in bar or filed such statement of his grounds of defense. An action shall be deemed brought on the day on which such notice is executed, if such notice be subsequently returned to the clerk's office to which same is returnable, within the time herein prescribed, and the execution thereof shall stop the running of the statute of limitations on the claim mentioned therein.

"If the motion be upon an account the plaintiff shall file with the notice an account, stating distinctly the several items of his claim, unless they be plainly described in the notice, and if the plaintiff file with such account an affidavit, such as is prescribed by section sixty-one hundred and thirty-three, on the part of the plaintiff in an action of assumpsit, no plea in bar or defense to the merits shall be received on the part of the defendant, unless accompanied by such affidavit as is prescribed by the last-mentioned section on the part of the defendant in an action of assumpsit. If such plea and affidavit be not filed by the defendant, the plaintiff shall, upon motion made in open court, be entitled to a judgment for the amount claimed in the affidavit filed with his notice, and no further proof of the plaintiff's claim shall be necessary. If such plea of defense and affidavit be filed and the affidavit admits that the plaintiff is entitled to recover from the defendant a sum certain less than that stated in the affidavit by the plaintiff, judgment may be taken by the plaintiff for the sum so admitted to be due, and the case be tried as to the residue.

"Upon any motion under this section the same rules shall apply, with reference to bills of particulars and grounds of defense, as are now provided by law in other actions or motions.

"In the event the return day of any notice given under the provision of this section, should happen to be a day of the term on which the court did not sit, or a day after the final adjournment of a term, such notice shall not be lost, but shall be deemed matured for hearing on the first day thereafter of the same term on which the court sits or the first day of the next regular term of the said court, as the case may be, and shall be docketed on that day by the clerk." Virginia Code, section 6046.

CONFORMITY ACT

Section 724, Title 28, U. S. C.—Conformity to practice in State courts.—The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding. (R. S. Sec.

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DEC 2
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM 1936

No. 11

L. P. CHISHOLM, WALLER HOLLADAY, W. EARL CRANK, T. S. WINSTON and W. R. DUNKUM, *Petitioners,*

vs.

W. B. GILMER, Receiver of the First National Bank of Louisa, Virginia, *Respondent.*

PETITION FOR REHEARING

HOMAN W. WALSH,
MINITREE JONES FULTON,
Counsel for Petitioners.

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W. B. GILMER, Receiver of the First National Bank of Louisa, Virginia, *Respondent*.

PETITION FOR REHEARING

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your above named petitioners most earnestly petition your Honorable Court to rehear its opinion, decision and decree, rendered in the above styled case on November 9, 1936, affirming the decision of the United States Circuit Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court for the Eastern District of Virginia, holding that it had jurisdiction to entertain the above styled suit and the proceedings had therein.

Your petitioners, after a careful review, study and consideration of your above opinion and decision and of the cases cited therein, and the pertinent law, represent that they believe and are advised that the United States District Court for the Eastern District of Virginia was without jurisdiction to entertain said suit and the proceedings had therein, because:

1. The jurisdiction of the said United States District Court is one conferred by the laws of Congress, enacted pursuant to the Constitution of the United States, and is not derived from State statutes or forms of pleadings, practice and proceedings obtaining in the State Courts of Virginia.

On this point the record shows that the above suit was attempted to be begun in the United States District Court for the Eastern District of Virginia by a Notice of Motion drafted and signed solely by the Receiver of the First National Bank of Louisa, Virginia, by its counsel, claiming that the authority for such proceedure was authorized by and was pursuant to the State practice, pleadings and Code of Virginia, and by the Conformity Act, (R. S. 914; 28 U. S. C. A., Section 24; O. P. 1-2).

This Notice of Motion did not issue out of the United States District Court for the Eastern District of Virginia, and did not bear the seal of the Court and was not signed by the Clerk thereof, as is provided by Section 911 of the Revised Statutes of the United States, in order for that Court to exercise its jurisdiction and enter judgment against Petitioners in a personal action therein.

Upon the return day of the Notice of Motion objection was made thereto on behalf of your petitioners on the ground that the United States District Court was *without* jurisdiction to entertain such an attempted proceeding by a Notice of Motion issued and signed solely by the Receiver to enforce an alleged personal liability against your petitioners for double assessment made by the Comptroller of the Currency upon bank stocks alleged to be owned by your petitioners in the First National Bank of Louisa, because of its alleged insolvency.

The "cause of action" sought to be so asserted by such a Notice of Motion in a Federal Court and arises solely under and by virtue of the laws of the United States—Title 12, U. S. C. A., Sections 63 and 64—is a purely Federal statutory "cause of action," and there was no "like cause" existing for such a double assessment on shares of stock of either insolvent National or State banks under the laws of the State of Virginia within the meaning of the Conformity Act. That Section 911 of the Revised Statutes of the United States provided a clear, complete and adequate remedy and mode of procedure in the United States District Court is beyond the peradventure of a doubt. It applied.

The Receiver of the First National Bank, therefore, has a complete remedy *provided by and under the laws of the United States in the Federal Courts.* There was, therefore, no reason or necessity for the Receiver of the First National Bank of Louisa, Virginia, to abandon such remedy, disregard Section 911 of the Revised Statute and to try to invoke the jurisdiction of the United States Dis-

trict Court and to try to proceed differently or according to the State Statute, Section 6046 of the Virginia Code, or according to the forms, practice, pleadings, or modes of procedure existing in the State Courts of record of Virginia in cases before the State Courts.

The cause of action was not one arising under the laws of Virginia, and the remedy provided by such State laws for causes of action existing in said State Courts could not have any possible application to the institution of the above suit in a Federal Court on a purely Federal statutory liability imposed upon your petitioners pursuant to, and solely by virture of and under authority of the laws of the United States by the Comptroller of the Currency. Title 12, U. S. C. A., Sections 63 and 64.

In *Coffee* v. *U. S.*, 117 U. S. 233, 6 Sup. Ct. 717; 29 Law Ed. 890 at 891, this Honorable Court held that the practice in the Courts of the United States as to the pleadings involved in that suit were settled by the Act of June 1, 1872, now Section 911 of the Revised Statutes of the United States, and was *not* changed by Section 5 of that Act, now Section 914 of the Revised Statutes known as the "Conformity Act." There an application for a rehearing of this Court's above holding was made; but this Court, upon such rehearing, adhered to its original opinion (29 Law Ed. 681-684), and upon such rehearing said:

> "Section 914 prescribes a conformity to the practice in the Courts of the State *only* 'as near as may be' and *only* 'in like causes.' It is a proper construction of this section to hold that while the provisions of the Code of Kentucky in regard to pleadings in civil suits

in *personam* in 'like causes' in Federal Courts of Kentucky, and does *not* apply to suits in rem by the United States for the forfeiture of property after its seizure for the violation of a revenue law, because there are no 'like causes' known to the law of Kentucky."

By analogy and for like reasons, Section 914 of the Revised Statutes of the United States has no application to your petitioners' case, since the "cause of action" in your petitioners' case is one arising *solely under the laws of the United States*, and since Congress has provided in Section 911 a complete and adequate remedy and mode of procedure by which the jurisdiction of the U. S. District Court may be exercised for the enforcement of such Federal liability in the United States District Courts, and since there is no "double assessment" imposed by the laws of the State of Virginia on the stockholders of insolvent National Banks or State Banks. There is and can be no such "like cause" in the State Courts of Virginia, since the liability attempted to be asserted here under the Conformity Act is a new and wholly Federal statutory "cause of action" for which the Revised United States Statute, Section 911, provides a complete and adequate remedy in the Federal District Courts.

Your petitioners respectfully represent that where Congress has legislated and provided such a remedy, as it has in the instant case, the Conformity Act, Section 914 R. S. can have no application. It cannot supplant Section 911 or give any additional remedy or mode of procedure or authorize a proceeding different in such cases and thereby supplant that section wherever applicable by forms of procedure that may be set up in the sundry State

Courts for invoking the jurisdiction of such State Courts under State laws.

2. The result of the affirmance of the decision of the United States District Court in your petitioners' case is to authorize 48 different modes of procedure or forms of proceeding, practice, and pleadings pursuant to the 48 State laws, and substitute them for the clear, complete and adequate method or remedy provided by Section 911 of the Revised Statute. This will result in "confusion confounded" in cases where Congress has already provided a simple, clear, complete and adequate remedy and mode of procedure by Section 911 R. S., and will allow the 48 States to define and prescribe 48 different and loose procedures to invoke the jurisdiction of the United States District Courts according to whatever the State practice and forms of procedure and mode of pleading may be provided by them in lieu of the one simple and plain mode provided by Section 911 U. S. R. S., and thus supplant the plain and adequate mode for invoking the jurisdiction of the United States District Courts in the manner and form provided by Congress.

3. Your Honorable Court appears to have based its opinion, decision and decree upon the remedy or form of procedure obtaining in Virginia as to causes of action in State Courts, governed by Section 6046, Virginia Code, providing a mode of procedure for the institution of suits in the State Courts of Virginia.

Such State Statute, it is respectfully submitted, cannot create or enlarge the jurisdiction of the Federal Courts in such cases as that of your petitioners, when Congress has

provided a mode of procedure by which the jurisdiction of the United States District Court can be invoked in such cases. *Expressio unius exclusio alterius.*

It is also respectfully and with great deference submitted that the fact that the State of Virginia authorizes a proceeding by a notice of motion to begin a suit in the State Courts of record, and that such State mode of procedure is a popular one, would not and does not in any way give the United States District Courts the power or authority to disregard the mode of procedure expressly provided by Section 911, Revised Statutes. It would seem that this statement of law is so obvious to need citation of authority.

It is also with great deference respectfully urged that the fact that the State remedy by notice of motion in the State Courts under Section 6046 of the Virginia Code, was an ancient one in that State, and that the United States District Court for the Eastern District of Virginia had entertained proceedings by notice of motion in the cases of *Leas and McVitty* v. *Merriman*, 132 Fed. 510 (1904) and later (January, 1935) by the Court of Appeals for the Fourth Circuit of the United States, and also in *Ely* v. *Gimball*, 35 Fed. (2d) 171, at 173, claiming to have the authority to do so in those cases under and by virtue of the Conformity Act (R. S., Section 914; 28 U. S. C. A. 724; op. 2) cannot authorize the respondent in this case and the District Court to disregard Section 911, U. S. R. S., which provides a complete and adequate remedy for invoking the jurisdiction of the United States District Court on a purely Federal Statutory liability, and

to attempt to invoke the jurisdiction of the United States District Court by a different State remedy provided for invoking the jurisdiction of the State Courts in causes of action begun in them.

The action here was one of which the Federal Court had jurisdiction. It was a new and wholly statutory Federal liability for which Section 911 provided a remedy. Instead of following that remedy the respondent sought to invoke the jurisdiction of the Federal Court by a mode of procedure authorized by Section 6046 of the Code of Vriginia, for the institution of suits in its own State Courts. He undertook to invoke the jurisdiction of the United States District Court to recover an assessment levied by the Comptroller of the Currency of the United States on the shares of stock of an insolvent National bank, of which the United States District Court had jurisdiction under and by virtue of Title 12, U. S. C. A., Sections 63 and 64, providing for such double assessment on the stock of insolvent National banks. This "cause of action" was wholly unknown to the common law and was not created by the laws of the State of Virginia, and the respondent was given a complete remedy and method of invoking the jurisdiction of the United States District Court by Section 911 of the Revised Statutes. *The Conformity Act, Section 914, U. S. R. S., was never intended to supplant such Section 911.* The United States District Court was, therefore, clearly without jurisdiction to entertain such proceeding in your petitioners' case, under and by virtue of a notice of motion which was begun and issued solely by the respondent and his attorney, and which was not under the seal of the District Court of the United

States, nor signed by its Clerk, and did not bear the teste of the District Judge, as was required by Section 911 of the Revised Statutes in such a case.

4. The provisions of Section 914, U. S. R. S., only prescribes a conformity to the practice in Courts of Record of the State, where Congress has not *already legislated or spoken on the subject*, and has not provided a complete and adequate remedy and mode of procedure, as it has done here in your petitioners' case by Section 911, and then only "as near as may be, and 'in like cause'." By this language it was not intended that the United States District Court should abandon the mode of procedure provided by Congress for calling into exercise its jurisdiction, and abandon the method expressly declared by Congress, and to substitute one provided by the State.

The Federal Courts were created by, and their jurisdiction is derived solely from, the Constitution of the United States, Article III, Section 1, which provides:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish."

Acting under that Constitutional grant, the Congress of the United States created the District Courts of the United States and the jurisdiction of those Courts is, therefore, solely controlled and conferred by the Acts of Congress, and not by State laws or by Section 6046 of the Code of Virginia.

As early as 1789, by what is known as the *Judicial Act*. Congress created the United States District Courts, and by Section 911 of the Revised Statutes, *expressly* declared how the jurisdiction of those Courts could be invoked and called in to exercise by providing:

> "The writs and processes issuing from the Courts of the United States shall be under the seal of the Court from which they issue, and shall be signed by the Clerk thereof. Those issuing from the Supreme Court shall bear the teste of the Chief Justice, or when that office is vacant, of the Assistant Justice next in procedure, *and those issuing from the District Court shall bear the teste of the Judge, or when that office is vacant, of the Clerk thereof.*"

The language is "shall bear."

The States have no more power to change this method of asserting a purely Federal statutory cause of action or liability arising under the laws of Congress in the Federal District Courts than they have the power to say how writs and processes shall issue from the Supreme Court of the United States, and say that they shall not "bear the teste of the Chief Justice," or that suits shall be brought in the United States District Courts asserting a purely Federal statutory liability by a notice of motion, and that it shall *not* issue from the United States District Courts or be under the seal of those Courts from which they issue, and shall not bear the teste of the Judge, than they have the power to say that writs and processes issued by the Supreme Court of the United States shall not bear the teste of the Chief Justice, etc.

Congress having provided the respondent in the instant case with a simple, clear and adequate mode of procedure for invoking the jurisdiction of the United States District Court in such cases, this Federal procedure may not be disregarded and supplanted purely upon the theory that some lawyers in the various States may not read the Federal statutes and familiarize themselves with the remedy provided, but may disregard the Federal procedure and adopt a remedy or procedure or mode of proceeding created or authorized by State statutes in State Courts. The argument of mere convenience or unfamiliarity by the legal profession with these clear Federal remedies most certainly should be no ground for disregarding a Federal statute and the plain and simple Federal remedy and mode of procedure of invoking the jurisdiction of the Federal Courts. To abolish or disregard the Federal statutes on such grounds would tend to laxity, and would certainly not add to the standards that should be required by the Federal Courts or of the legal profession in the practice in the Federal Courts.

It is therefore respectfully submitted that the fact that the legal profession may be familiar with the practice in the State Courts and not familiar with the mode of procedure in the Federal Courts, is not a valid reason for disregarding the mode of procedure provided by Section 911, R. S., in cases where Congress has provided, as it has done here, a simple, complete and adequate mode of procedure.

It is respectfully submitted that the Conformity Act was never intended to have such effect or to supplant the

remedy and mode of procedure provided for by Section 911 R. S., and to authorize the United State District Courts to disregard that section, affording as it does a clear, complete and adequate remedy and mode of procedure to recover a liability existing under a Federal statute, and to substitute notice of motion for all (such) writs and processes issuing from the Courts of the United States," or to say that notices of motion filed in the United States District Court should *not be under the seal of the Court from which they issue, and should not be signed by the Clerk thereof and should not be served by the Marshal of the United States.*

5. Your petitioner respectfully urges that the notice of motion in this case was process within the meaning of Section 911 R. S., and it had to be under the seal of the United States District Court and signed by the Clerk thereof, and that since the notice of motion in the instant case was not under the seal of the United States District Court and was not signed by its Clerk, that it did not invoke the jurisdiction of the United States District Court or confer jurisdiction upon that Court to entertain such a procedure, as was contended at the bar of this Court in the instant case, either by the respondent merely writing a notice of motion and delivering it to your petitioners in person, or, perchance, by letting them find it, or by sending it to them through the mail.

It is respectfully submitted that there is no reason or necessity that would justify such laxity in procedings to invoke the jurisdiction of the United States. To do so would open the door to fraud and collusion in under-

taking to obtain the jurisdiction of the United States District Court by establishing that such a notice was delivered by somebody unknown to the Court, or, perchance, to try to know that it was found by your petitioners, or the defendants, or had been mailed to them, in order to establish service of such notice of motion, or not served by the United States Marshal, nor under the seal of the Court and not signed by the Clerk thereof.

The jurisdiction of the District Courts is statutory and essential and Congress undertook to say, in Section 911 R. S., that it should be exercised, certainly in cases created and arising solely under the laws of the United States, in the mode and manner provided by such statutes, and not leave it open to the States to substitute a different and a more lax method of invoking the jurisdiction of the Federal Courts, or that they could do so in any other way than by having this so-called notice of motion issued under the seal of the United States District Court, and signed by the Clerk thereof, and executed by the Marshal of the United States, an officer of the Court. Congress evidently had in mind by the adoption of this mode of procedure, the avoidance of any imposition upon the Courts and its jurisdiction, and to provide *a method of evidencing notice* to litigants and to be sure that they could be deprived of their property under the law of the land *only after due process.* Congress intended thereby to make sure that every litigant was given "notice," and was and had been afforded fair opportunity to be heard by a method provided by Congress.

It is therefore respectfully and earnestly urged that Congress provided by Section 911 R. S. that the juris-

diction of the Federal Courts could be *only* invoked by a writing, whether in form that of a process or writ, or notice of motion, when that paper, by whatever name called, was under the seal of the District Court from which it issued, and signed by the Clerk thereof, and was executed by the United States Marshal.

The sanctity of the Federal Courts, the great power of those Courts, their jurisdiction, was intended to be exercised and evidenced by requiring all papers or writings instituting suits, whether you call them processes, writs or notices of motion, to be under the seal of those Courts, signed by the Clerks theerof, and served by the Marshals of those Courts.

This protection to litigants and the citizens of the land may not, it is respectfully submitted, be disregarded or be transferred to the legislatures of the 48 different States to provide 48 different methods or modes of procedure and to define what shall be sufficient notice, not only to the litigants, but to the Federal Courts themselves.

Your petitioners duly appreciate the gravity of the great questions here involved affecting the jurisdiction of the Federal Courts and of what should be regarded as process which deprives litigants of their property and rights in the Federal Courts. Your petitioners appreciate the difficulties of this Court when it said in its opinion, at page 3, after quoting Section 911, R. S.:

> "We do not essay a definition of the word "process" in every contract. It may take on varying shades of meanings in various surroundings. For

> the present purposes it is enough to say that a notice of motion, if process at all, is not process issuing from a Court, and, assuredly, it not a writ."

For that reason it is respectfully submitted that whether a notice of motion is or is not in form a process, that Congress, nevertheless, prescribed that the paper writing, by whatever name it may be called, should be under the seal of the United States District Court, signed by its Clerk and served by a Marshal of the United States.

This has been so held by the Circuit Court of Appeals in the case of *Peaslee* v. *Haberstro*, Federal Cases 10, 884, where that Court set aside the summons therein "upon the ground that the summons was not signed by the Clerk or under the seal of the Court," and on the further ground that the Conformity Act *only* applied where there was no statute of the United States prescribing the practice, forms or modes of procedure, and held that it *only* applies where the statutes of the United States are silent, and that then the practice of the State Court would prevail only when the statutes of the United States had not spoken. The Court there said:

> "If the summons in this case had been signed by the Clerk it could be amended as regards the seal. As it is there is *no summons* in the *nature of process* known to this Court."

In *Dwight* v. *Merritt* (Circuit Court, S. D. N. Y.), 4 Fed. 614, a case where a motion was made to set aside the summons issued in the form provided by the statutes of New York for commencing a civil action in the State Court, was *only signed by the plaintiff's attorney, and was*

not under the seal of the Court, it was held that such a summons or *notice* was in effect the commencement of a suit, and *was in effect process,* "quite as much as a capias to appear and answer, is process." The Circuit Court of the United States there said:

> "The statute (R. S. 911) intends that all processes shall issue from the Court, where such process is to be held to be the action of the Court, and that the *evidence that it issues from the Court and is the action of the Court, shall be the seal of the Court and the signature of the Clerk."*

The Court there said:

> "It is clear that a signature by the plaintiff's attorney, without a seal and issuing from the office of such attorney, *cannot be substituted."*

There is nothing in the provisions of Section 914 which abrogates these provisions of Section 911.

In *Johnson* v. *Hedley,* Fed. Cases 7389, it was held that a summons *issued by the plaintiff's attorney was not a proper summons,* and that such a summons, notwithstanding the provisions of Section 914 of the Revised Statutes, *must be issued by the Court and have the authenticity of Court.*

In *United States* v. *Martin,* 223 Fed. 805 (E. D. N. Y.), the Court said:

> "Federal legislation, of course, must be followed, although opposed to the practice and procedure of the State Courts."

The Federal Court there held that an action may not be commenced in the Federal Courts by summons issued in the name of the plaintiff's attorney, pursuant to the mode of commencing actions in the Courts of the State of New York. See in accord *Midland Paper Company* v. *Rock River Paper Company*, 19 Fed. 252.

In re: Condemnation, 253 Fed. 433 (E. D. Tenn.), Sanford, Judge, held that an original suit in a Federal Court must be commenced by a summons or *other process* of the Court itself. *Such process must be signed by the Clerk and under the seal of the Court to be valid, regardless of any difference of provisions as to the form of State summons in State Courts; the general Conformity Act not operating to waive that specific requirement.* To cite further authorities would be superarrogation. This holding appears to be sound and unanswerable.

6. This Honorable Court appears to have overlooked the fact that it is not contended by your petitioners that the form of a Notice of Motion to recover money in the United States District Court authorized by State practice, may not be used in the Federal Courts, so far as its mere form is concerned, but in such case the notice of motion must be signed, not merely by the plaintiff or his attorneys, but must be signed by the Clerk of the United States District Court and must be under the seal of that Court, and must be served by the United States Marshal. Rose's Code, Vol. I, Sec. 901. Hughes' Fed. Proc. (2 Ed. Sec. 137). Id. 6 Ed. Sec. 3584.

The principle is that where Congress has, by statute, pointed out how the jurisdiction of the United States

Courts may be invoked and has legislated generally upon the subject by providing a mode of procedure, such legislation must be followed, even though the mere form of the writing be that of a notice of motion, or of any process or summons. Congress intended by that statute that all such writings, summons, processes and writs should issue from the Court where such paper writing is to be held to begin an action which will deprive a litigant of his property and rights, and that the evidence that the writing issued from the Court and is the action of the Court, "shall be the seal of the Court and the signature of the Clerk."

There is nothing in the provisions of Section 914, it is respectfully submitted, which abrogates in any way these provisions of Section 911 of the Revised Statutes. Such a notice of motion or writing is in the *nature of a process;* it has the effects of a process both upon the person and property of the defendants. To hold otherwise, it seems to your petitioner, would be to allow the States to provide an entirely different mode of procedure by which litigants could be deprived of their property and rights in a manner and mode different and contrary to that expressly provided by Congress. The Conformity Act, it is respectfully urged, was never so intended to so operate or to be so construed.

This Court, in *Purcell* v. *Otts,* 9 Howard 336, 13 L. Ed. 164, at 169, discusses how the jurisdiction of the Federal Courts may be invoked in suits in personam between litigants. This Court held:

> "Jurisdiction is acquired in one of two modes: against the property of the defendant within the

service of process, or, secondly, by a procedure against the property of the deefndant within the jurisdiction of the Court."

If the notice of motion in the instant case is not in the form of process, it, nevertheless, takes the place of process, and, in substance and to all intents and purposes, is process and has the effect of process, and in order to give the United States District Court jurisdiction it should be required to be issued under the seal of the District Court and to be signed by the Clerk thereof. It is in effect a "writ or process," although in form of a notice of motion, and should be held to be governed by the Revised Statutes, Section 911, both as to issuing under the seal of the Court and being signed by the Clerk.

In *Cooper* v. *Reynolds*, 10 Wallace 308, 19 L. Ed. 931, at 932, this Court, determining the manner of the exercise of the jurisdiction of the United States Court, held that *the jurisdiction of the person* is obtained by the service of *process*. This Court thus held that the method of obtaining jurisdiction of the *person* was by the *service of process* on a litigant. This was clearly so, and Congress so declared by Section 911, R. S., and how that process should issue and be signed.

It is respectfully urged that a State cannot abrogate this requirement as to obtaining jurisdiction of the person, and that any paper writing, whether it be in form of a notice of motion as required by some States, or by a process or writ or summons, must be under the seal of the United States District Court from which it issues, and be signed by the Clerk thereof. To hold otherwise would

be to say that the 48 different States, through their several legislatures, could determine how the jurisdiction of the person in a Federal Court could be obtained, and could prescribe that it could be obtained in a way and manner different from that prescribed by Congress.

It is respectfully urged that this Honorable Court, in affirming the decision of the Circuit Court of Appeals for the Fourth Circuit, affirming the decision of the United States District Court for the Eastern District of Virginia, should have followed the above cited decisions of the Federal Courts, and thus established one uniform method of invoking the jurisdiction of the United States District Courts, where jurisdiction is sought to be obtained *of the person*, and should have required all such suits to have been begun by a paper writing, issued under the seal of the United States District Court and signed by the Clerk thereof as required by Section 911 R. S., *in order to have established one uniform practice in every District Court of the United States, and in order to have protected the person sued*, and the Court, from possible imposition, collusion and fraud, as to whether the defendants had or had not notice and had had his day in Court.

The contention that the jurisdiction on the person in the Federal Courts may be obtained by any method or way provided by a State statute, whether it be by letter, merely posted, or by some unofficial and unknown person claiming to have handed a copy of the notice or paper to such person, or whether by losing it and that the defendant had found such a notice, would be to strike down the great and fundamental right and sanctity and safety that attaches

to and that will call into power the jurisdiction of the Federal Courts. It is, with great deference, respectfully submitted, that the reasons of the above cited Federal cases from New York and elsewhere should be held to be controlling in the instant case; that they represent the sounder and safer view, and insure that no person shall be deprived of his property and of his rights except as provided in Section 911 of the Revised Statutes, namely: by the issuance of a process, writ, or notice of motion *under the seal of the Court and signed by the Clerk thereof.*

CASES CITED IN THE OPINION OF THIS COURT DISTINGUISHED

The case of *Iowa Central Railway Co.* v. *Iowa*, 160 U. S. 389, was begun in a State Court of Iowa to foreclose a mortgage. The case finally found its way to this Court, which, in effect, held that the Constitution of the United States did not attempt to choose between one method and another of a procedure to foreclose mortgages in State Courts. There the suit was begun and prosecuted under and pursuant to the State law, practice and procedure and by a form of action proper in the State Court of Iowa. This Court held that such a State procedure afforded due process of law. That suit did not relate or refer to how the jurisdiction of the United States should be invoked as to the person, in the Federal District Courts in a suit asserting a purely Federal statutory liability, as to which the United States Revised Statutes, Sec. 911, expressly provides how the jurisdiction of the United States District Court may be invoked under section 911, R. S.

The case of *Shriver* v. *Wodbine Bank,* 285 U. S. 467, at 477; 52 S. Ct. 430, was begun by an Iowa Banking Corporation in the Courts of that State under a State statute providing for an assessment made under it for the restoration of any impairment of capital of a bank by assessment pro rata of the stockholders. The case came to this Court under the Judicial Code, Section 237, from the judgment of the Iowa Supreme Court. *The method of invoking the jurisdiction of the Federal Court on a purely Federal statutory liability appears not to have been involved at all in that suit.* This Court there appears to have only held that the Iowa statute declaring State bank stockholders personally liable to pay assessments made under the State statute was not unconstitutional as impairing the obligation of contract or depriving him of his property without due process of law, and did not violate the 14th amendment to the Constitution of the United States. This Court, however, did hold, syllabus 6, and in clauses 6 and 7:

> "It is true that where a statute creates a liability and provides a remedy by a suit specificially adapted to its enforcement, other less appropriate common law remedies are impliedly excluded."

and cited many cases in support of this holding.

Your petitioners respectfully represent that by analogy and like reasoning this Court should have held that where Congress has created a liability, as it has in the instant case, under Title 12, U. S. C. A., Sections 63-64, and has provided a remedy by suit in the Federal Courts by the issuance of process, as is provided in Section 911, R. S.,

other remedies provided by State Statutes "are impliedly excluded."

The *Shriver* v. *Woodbine case*, therefore, insofar as it has any application to the jurisdictional question now before this Court, it is respectfully urged, sustains your petitioners' contention in the instant case.

The case of *Coffin Bros.* v. *Bennett*, 277 U. S. 29, at 31; 48 S. Ct. 422, was begun by a State Bank under the banking acts of the State of Georgia, to recover a double assessment imposed by the State Banking Laws of Georgia, and making such assessment a lien on the property of the stockholders. It was held by this Court that such a State statute did not violate "due process of law," in violation of the 14th amendment to the Constitution of the United States. There, as in the Iowa case, no question was involved as to the jurisdiction of a Federal Court, or as to the mode or method of invoking such jurisdiction.

In *Bernheimer* v. *Converse*, 206 U. S. 516, at 529; 51 L. Ed. at 524, the question there involved was as to the validity of the assessment upon the stockholders and the liability of a Minnesota corporation for the payment of a stockholder's liability, and the right to recover the same in a Federal Court *in a State other than the one in which the original proceedings in liquidation were had.* The jurisdiction of this Court under Section 911 of the Revised Statutes and as to the method or mode of procedure, appears not to have been involved.

Christopher v. *Norvell*, 201 U. S. 216, at 225-226; 50 L. Ed. 732, appears to have involved only the question as

to whether the *coverture* of the legatee of shares of stock in a National Bank, when her name was placed upon the bank's books as a stockholder and when she received the certificate of stock, did not protect her against a personal judgment at law for the amount due as a shareholder under an assessment made by the Comptroller of the Currency, to pay the debt of the bank. *It in no way involved the question of the jurisdiction of the District Court.* This Court there held that under the Revised Statutes, Sections 5151, 5152 and 5234, a married woman became *individually* responsible to the amount of her stock at the par value thereof, and that such *individual* responsibility upon the shareholders of a National bank, made no exception in favor of a married woman (735).

Your petitioners appreciate the pronouncement of this Honorable Court that, "A Federal Court, adhering to the Conformity Act, must follow the local practice *unless* some other act of Congress created an exception to the general duty of the Conformity Act,—as declared a specific rule,"—but they respectfully urge that it cannot be gainsaid, that under Section 911 of the Revised Statutes of the United States Congress, "has declared a specific rule" —has legislated—whereby the respondent, the receiver of the First National Bank of Louisa, to recover from your petitioners the double assessment imposed under Title 12, U. S. C. A., Sections 63-64, by the Comptroller of the Currency, *could proceed in the United States District Courts by issuance of process or by a notice of motion* provided that such a proceeding in the United States District Court is under the seal of the Court and signed by the Clerk thereof, and served by its Marshal, as hereinbefore stated.

The cases of *Ex parte Fisk*, 113 U. S. 713; *Whitford* v. *Clark County*, 119 U. S. 522; *So. Pac. Co.* v. *Denton*, 146 U. S. 202, at 209, cited in the printed opinion of this Court at page 9, are not in conflict with this contention, since Section 911 excludes a procedure by notice of motion which is simply signed by the receiver of a bank, or by and through his attorneys. Such a motion, when authorized by State practice, may be used in the Federal Courts, *but it is respectfully urged* that in such case the *notice of motion must be signed*, not alone by the attorneys of the plaintiff, *but must issue from and be under the seal of the Court and must be signed by the Clerk thereof.*

As was said by Mr. Hughes in his 6th edition, cited *supra:*

> "In general the forms of such processes that obtain in the State Courts are adopted in the Federal Courts, except that there can be *no* departure from the Federal statutory requirements as to the sealing, signing and testes of writs and processes."

For the foregoing reasons your petitioners respectfully urge that this their petition for rehearing may be granted, and that the opinion, decision and decree of this Honorable Court may be reheard, reviewed and reversed.

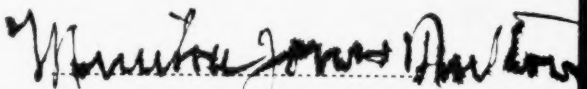
Respectfully submitted,

L. P. CHISHOLM,
WALLER HOLLADAY,
W. EARL CRANK
T. S. WINSTON,
W. R. DUNKUM.

HOMAN W. WALSH,
MINITREE JONES FULTON,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL

The undersigned, Minitree Jones Fulton, member of this Bar, and of counsel herein for petitioners, hereby certifies that the foregoing petition is presented to this Court in good faith and not for delay.



MINITREE JONES FULTON.

November 30, 1936.

page 1

SUPREME COURT OF THE UNITED STATES.

No. 11.—October Term, 1936.

P.

L. W. Chisholm, et al., Petitioners,
vs.
W. B. Gilmer, Receiver of the First National Bank of Louisa, Virginia, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[November 9, 1936.]

Mr Justice Cardozo delivered the opinion of the Court.

The controversy is one as to the jurisdiction of a United States District Court in Virginia to apply the Virginia practice whereby a notice of motion for judgment is accepted as a substitute for a writ or other process issued from a court.

Petitioners, shareholders in a national bank, have been charged by the Comptroller of the Currency with an assessment in the amount of the par value of their shares. To enforce that assessment, respondent, the receiver of the bank, gave notice of motion that he would apply for judgment at a given time, incorporating in the notice a statement of the facts making up the claim. There is no question that the practice was in conformity with the statutes of Virginia. The notice, which was signed by the receiver, was served upon the shareholders by the marshal, though it would have been equally efficacious if served by someone else. It did not issue out of the court, did not bear the court seal, and was not signed by the clerk. Upon the return day of the motion the objection was made in behalf of the petitioners that the "process" was unavailing to bring them into court. The objection was overruled and later, after trial, a judgment on the merits went in favor of the receiver. Upon appeal to the Court of Appeals for the Fourth Circuit, the judgment was affirmed. 81 F. (2d) 120. To set at rest a controversy as to an important question of procedure, this Court granted certiorari "limited to the question of the jurisdiction of the District Court."

The remedy by notice of motion in Virginia is governed by section 6046 of the Virginia Code. "Any person entitled to maintain an action at law may, in lieu of such action at law, proceed by motion." The remedy is an ancient one. It goes back to 1732, though at first it was limited to claims for public moneys payable by

sheriffs. Acts of May, 1732, c. 10, § 8, 4 Va. Stat. (Hening) 352. Gradually it was extended to other situations. As early as 1849 it was made applicable to claims on contract generally. Virginia Code (1849), c. 167, § 5. From contracts it spread to torts (Virginia Acts [1912] 5), and to statutory penalties. *Ibid.* 651. A revision of the Code in 1919 made the remedy even broader. Virginia Code, 1919, § 6046. The history of the development has been traced with painstaking precision by students of procedure.[1]

There is trustworthy evidence that in the practice of the Virginia courts the remedy by motion has almost superseded the common law forms of action.[2] Even in the federal courts held in the same territory the new procedure has succeeded to a large extent in crowding out the old. An opinion of a federal District Judge (McDowell, J.), announced in 1904, shows the remedy by motion then accepted by the bar. *Leas & M'Vitty* v. *Merriman,* 132 Fed. 510. About thirty years later (January, 1935), the Court of Appeals for the fourth circuit with supervisory powers over courts in the same area made a study of the intermediate growth. By that time it appeared that the procedure by notice of motion was followed in ninety-five per cent. of the common law actions begun in a federal court at Richmond, thirty-three-and-a-third per cent. of those begun at Norfolk, and fourteen per cent. of those begun at Alexandria. *Eley* v. *Gamble,* 75 F. 2d) 171, 173.

Under the Conformity Act (R. S. § 914; 28 U. S. C. § 724), "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding". How a suit shall be begun, whether by writ or by informal notice, is a question of the practice of the state or of its forms and modes of proceeding. *Amy* v. *Watertown,* No. 1, 130 U. S. 301, 304. The Constitution of the United States does not attempt to make a choice between one method and another, pro-

[1] Burks, Pleading and Practice in Actions at Common Law (1st Ed., 1913) 164; Millar, Three American Ventures in Summary Civil Procedure, (1928) 38 Yale Law Journal 193; Clark and Samenow, The Summary Judgment, (1929) 38 Yale Law Journal 423; Report of the College of Law of West Virginia to the Bar Association, (1929) 36 West Virginia Law Quarterly 5, 70.

[2] E. C. Burks, Note to Hanks *v.* Lyon, (1895) 1 Va. Law Register 441; Millar, The Summary Judgment, *supra,* at p. 221; Report of the College of Law of West Virginia, *supra,* at p. 70.

vided only that the method employed "gives reasonable notice and affords fair opportunity to be heard before the issues are determined". *Iowa Central R. Co.* v. *Iowa*, 160 U. S. 389, 393. The remedy by notice of motion has had repeated approval by the highest court of Virginia. *Virginia Hot Springs Co.* v. *Schreck*, 131 Va. 581; *Security Loan & Trust Co.* v. *Fields*, 110 Va. 827; *Drew* v. *Anderson*, (1797) 1 Call 51, 53. It is here sought to be applied, not in equity or admiralty (*Coffey* v. *United States*, 117 U. S. 233), but in a common law cause, a quasi-contractual obligation being the source of liability. *Shriver* v. *Woodbine Bank*, 285 U. S. 467, 476; *Coffin Brothers* v. *Bennett*, 277 U. S. 29, 31; *Bernheimer* v. *Converse*, 206 U. S. 516, 529; *Christopher* v. *Norvell*, 201 U. S. 216, 225, 226. A federal court, adhering to the Conformity Act, must follow the local practice, unless some other act of Congress, creating an exception to the general duty of conformity, has declared a special rule. *Ex parte Fisk*, 113 U. S. 713; *Whitford* v. *Clark County*, 119 U. S. 522; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 209.

Petitioners profess to find the necessary exception in Section 911 of the Revised Statutes (28 U. S. C. § 721), which provides: "All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the Supreme Court shall bear teste of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence, and those issuing from a district court shall bear teste of the judge, or, when that office is vacant, of the clerk thereof." We do not essay a definition of the word process in every context. It may take on varying shades of meaning in varying surroundings. For present purposes it is enough to say that a notice of motion, if process at all, is not process issuing from a court, and assuredly is not a writ.[3] Only writs or processes so issuing are governed by the statute. This is the view expressed more than thirty years ago by Judge McDowell in two cases (*Leas & M'Vitty* v. *Merriman, supra*, and *Schofield* v. *Palmer*, 134 Fed. 753), which did much, we may be confident, to guide the conduct of the federal bar in adhering to the Virginia practice. It is the view expressed by Judge (later Mr. Justice) Sanford in the District Court of Tennessee. "In any proceeding which may be

[3] Pollock & Maitland, History of English Law, 2nd Ed., vol. I, p. 150; Radin, Anglo-American Legal History, p. 179; Holdsworth, History of English Law, vol. II, p. 193.

properly instituted and proceeded with upon mere notice to the parties in interest, without process from the court itself, the requirements of section 911 have no application." *In re Condemnation Suits by United States,* 234 Fed. 443, 445. It is the view accepted by the Court of Appeals for the Fourth Circuit in *Eley* v. *Gamble, supra,* and again in the case at hand. Cf. *Wile* v. *Cohn,* 63 Fed. 759.

There is instruction also in many state decisions dealing with cognate questions. The Constitution of Virginia prescribes (§ 106) that "writs shall run in the name of the 'Commonwealth of Virginia', and be attested by the clerks of the several courts". The Virginia courts have perceived nothing in that mandate at war with the validity of a summary notice of motion signed and issued by the parties. *Whitley* v. *Booker Brick Co.,* 113 Va. 434, 436; *Kain* v. *Ashworth,* 119 Va. 605; *Mankin* v. *Aldridge,* 127 Va. 761, 767; *Wood* v. *Kane,* 143 Va. 281. In many other states constitutional or statutory provisions as to the form of writs and other "process" have received a like construction. *People* v. *Lee,* 72 Colo. 598; *Gilmer* v. *Bird,* 15 Fla. 410; *Curry* v. *Hinman,* 11 Ill. 420, 424; *McKenna* v. *Cooper,* 79 Kan. 847; *Herndon* v. *Wakefield Moore Realty Co.,* 143 La. 724; *Hanna* v. *Russell,* 12 Minn. 80; *Dunlap* v. *Bull Head Oil Co.,* 167 Okla. 277; *Bailey* v. *Williams,* 6 Ore. 71; *Whitney* v. *Blackburn,* 17 Ore. 564, 571; *State* v. *Superior Court,* 142 Wash. 270; *Porter* v. *Vandercook,* 11 Wis. 70. The analogy is apt and the reasoning persuasive.

Petitioners lean heavily upon early decisions in the District and Circuit Courts for New York wherein the requirements of R. S. § 911 were held to be applicable to the New York form of summons. *Peaslee* v. *Haberstro,* (1879) Fed. Cas. No. 10884; 15 Blatch. 472; *Dwight* v. *Merritt,* (1880) 4 Fed. 614. In so far as these decisions and others following them (*United States* v. *Mitchell,* 223 Fed. 805) extend the rule of the statute to notices or forms of process not issuing from a court, they do not have our approval.

Petitioners suggest that the use of a notice of motion as a substitute for a summons is forbidden by Rule 14 adopted by the District Court for the Eastern District of Virginia. The same objection was adequately answered in *Eley* v. *Gamble, supra,* pp. 173, 174. If the rule has such a meaning it is inconsistent with the Conformity Act which governs practice in the district courts, "any rule of court to the contrary notwithstanding".

The judgment is

Affirmed.